No. 87-1639-CFX
Status: GRANTED

Title: Personnel Board of Jefferson County, Alabama, et al., Petitioners
v.
Robert K. Wilks, et al.

Docketed:
April 1, 1988

Court: United States Court of Appeals for the Eleventh Circuit

Vide:
87-1614
87-1668

Counsel for petitioner: Young,Frank M.

Counsel for respondent: Fitzpatrick Jr.,Raymond P., Solicitor General, Joffe,Robert D.

Entry	Date	Note	Proceedings and Orders
1	Apr 1 1988	G	Petition for writ of certiorari filed.
3	Apr 28 1988		Order extending time to file response to petition until May 20, 1988.
4	May 2 1988		The above extension of time applies to all respondents.
5	May 17 1988		Order further extending time to file response to petition until June 1, 1988.
6	May 18 1988		The above further extension of time applies to all respondents.
7	May 19 1988		Brief of respondents Robert Wilks, et al. in opposition filed. VIDED.
9	May 20 1988	X	Brief amicus curiae of International Assn. of Fire Fighters, AFL-CIO filed. VIDED.
8	May 24 1988		DISTRIBUTED. June 9, 1988
10	May 31 1988		REDISTRIBUTED. June 16, 1988
11	May 31 1988	X	Brief of respondent United States filed. VIDED.
12	Jun 20 1988		Petition GRANTED. limited to Question 1 presented by the petition. This case is consolidated with No. 87-1614, Martin v. Wilks and No. 87-1668, Arrington v. Wilks, and a total of one hour is allotted for oral argument.
			**********
14	Jul 12 1988		Order extending time to file brief of petitioner on the merits until August 18, 1988.
15	Aug 15 1988		Record filed.
		*	Certified original record received. (Vide: 87-1614, 87-1668).
17	Aug 17 1988		Brief amici curiae of ACLU, et al. filed. VIDED.
16	Aug 18 1988		Brief amici curiae of National League of Cities, et al. filed. VIDED.
18	Aug 18 1988		Joint appendix filed. VIDED.
19	Aug 18 1988		Brief of petitioners John Martin, et al. filed. VIDED.
20	Aug 18 1988		Brief of petitioners Personnel Board of Jefferson County, AL, et al. filed.
21	Aug 18 1988		Brief amici curiae of Alabama, et al. filed. VIDED.
22	Aug 18 1988		Brief amicus curiae of Equal Employment Advisory Council filed. VIDED.
23	Aug 18 1988		Brief amici curiae of NAACP, et al. filed. VIDED.
24	Aug 26 1988	G	Motion of the Solicitor General for divided argument filed.
25	Sep 2 1988	G	Motion of petitioners for divided argument filed.
26	Sep 15 1988		Brief amicus curiae of Pacific Legal Foundation filed.

No. 87-1639-CFX

Entry	Date	Note	Proceedings and Orders
			VIDED.
27	Sep 19 1988		Brief of respondent Robert K. Wilks, et al. filed. VIDED.
28	Sep 19 1988		Brief amicus curiae of International Association of Fire Fighters. AFL-CIO filed. VIDED.
29	Sep 22 1988		Brief of respondent United States filed. VIDED.
30	Oct 3 1988		Motion of the Solicitor General for divided argument GRANTED.
31	Oct 3 1988		Motion of petitioners for divided argument GRANTED.
32	Oct 24 1988		SET FOR ARGUMENT. Wednesday, January 18, 1989. This case is consolidated with 87-1614 and 87-1668. (1st case) (1 hr.)
37	Oct 24 1988	X	Reply brief of petitioners John W. Martin, et al. filed. VIDED.
38	Oct 24 1988	X	Reply brief of petitioners Richard Arrington, Jr., and City of Birmingham filed. VIDED.
33	Oct 26 1988	G	Motion of petitioners for leave to file a reply brief, out-of-time, filed.
34	Oct 31 1988		DISTRIBUTED. Nov. 4, 1988. (Motion of petitioners for leave to file reply brief out-of-time).
35	Nov 4 1988		CIRCULATED.
36	Nov 7 1988		Motion of petitioners for leave to file a reply brief, out-of-time, GRANTED.
39	Jan 18 1989		ARGUED.

87-1639

Supreme Court, U.S.
FILED
APR 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. .....

IN THE

Supreme Court Of The United States

October Term, 1987

THE PERSONNEL BOARD OF
JEFFERSON COUNTY, ALABAMA, *et al.*,
Petitioners,

v.

ROBERT K. WILKS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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March 31, 1988

QUESTIONS PRESENTED FOR REVIEW

1. Whether persons affected by court-approved consent decrees containing race conscious relief can challenge those decrees in a collateral proceeding when they had notice and the opportunity to be heard before the entry of those decrees?

2. Whether a party bound by a court-approved consent decree should be afforded more protection for actions taken thereunder than a party merely acting pursuant to a voluntary affirmative action plan?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs

James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Kenneth O. Ware
Phillip H. Whitley
Marshall G. Whitson
Robert K. Wilks
David H. Woodall

Plaintiff-Intervenor

United States of America

Defendants

Richard Arrington, Jr.
Roderick Beddow, Jr.
City of Birmingham
Joseph W. Curtin
James W. Fields
Patricia Hoban-Moore
Jefferson County Personnel Board
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Defendant-Intervenors

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas

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No. _____

IN THE

Supreme Court Of The United States

October Term, 1987

THE PERSONNEL BOARD OF
JEFFERSON COUNTY, ALABAMA, *et al.*,
Petitioners,

v.

ROBERT K. WILKS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, James B. Johnson and The Personnel Board of Jefferson County, Alabama, (hereinafter referred to collectively as the "Board") respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on December 15, 1987. Petitioners further request that the Court reverse the decision of the Court of Appeals.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in *In re Birmingham Reverse Discrimination Employment Litigation* is printed at Appendix p. 3a,[1] and is

[1]Pursuant to Rule 30.2, RULES OF THE SUPREME COURT OF THE UNITED STATES, the Board has agreed to submit a Joint Appen-

reported at 833 F.2d 1492 (11th Cir. 1987). The opinion of the United States District Court for the Northern District of Alabama in *In Re Birmingham Reverse Discrimination Employment Litigation* is printed at Appendix p. 27a, and is reported at 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. Dec. 20, 1985).

JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit was entered on December 15, 1987 (Appendix at 3a). A timely petition for rehearing en banc was denied on January 25, 1988 (Appendix at 25a), and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth and Fourteenth Amendments to the Constitution of the United States and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. Said provisions are set forth in pertinent part at Appendix p. 1a.

STATEMENT OF THE CASE

The events giving rise to this reverse discrimination litigation began in 1974 and 1975, when a series of lawsuits were commenced against the Board and the City of Birmingham (the "City") by several black males and the Ensley, Alabama branch of the NAACP who filed separate actions alleging that the Board's and City's employment practices unlawfully discriminated against blacks. Thereafter, the Department of Justice filed a separate "pattern and practice" complaint against the

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dix with Petitioners John W. Martin, *et al.*, and Richard Arrington, *et al.* The Joint Appendix has been contemporaneously filed with the petition of John W. Martin, *et al.*

Board and the City, asserting broad charges of race and sex discrimination in employment.

After consolidating the actions, the District Court judge, the Honorable Sam C. Pointer, Jr., conducted a bench trial on the limited issue of the validity of entry level tests for police and firefighters. In an opinion dated January 10, 1977, the District Court concluded that the Board's actions violated Title VII, finding that the tests had an adverse impact upon black applicants. On appeal to the Eleventh Circuit, the District Court's finding of discrimination against the Board was affirmed. *Ensley Branch of NAACP v. Seibels*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980).

A second trial was held in August 1979, during which the validity of certain other tests and screening devices employed by the Board were at issue. After that trial, but prior to a ruling by the District Court, extensive negotiations among the parties culminated in a settlement on terms embodied in proposed consent decrees intended both to address the issues and to govern the future employment practices of the Board and City. Subsequently, the Consent Decree to be entered into by the Board (hereinafter the "Board Decree") was provisionally approved by the District Court.

Since its creation in 1945, the Board has been responsible for recruiting, screening, testing, and certifying applicants for hire and promotion to those jurisdictions (including the City) governed by the Jefferson County, Alabama merit civil service system. As a result of findings of discriminatory practices in this process, the Board Decree contained a carefully constructed affirmative action plan designed to effect the integration of blacks and women into the civil service system. Pursuant to the objectives of the decree, the Board was to act as a conduit to afford the City the reasonable opportunity to meet the goals of the City's Consent Decree by certifying sufficient numbers of qualified blacks and women. Following the entry of the Board Decree, the Board has in good faith attempted to comply with its terms.

In August 1981, the District Court conducted a fairness hearing, considering objections to the decrees and argument and evidence advanced by the proponents thereof. Significantly, the white males who later elected to collaterally attack the consent decrees appeared at this hearing, voicing general objections to approval. Rather than attempting to intervene prior to or at the fairness hearing, these same whites waited until *after* the conclusion of the fairness hearing to move for intervention as parties, notwithstanding their longstanding prior knowledge of the pendency of the claims to be resolved by the decrees and the effect those claims might have upon their substantive rights. Judge Pointer appropriately denied the motion to intervene and granted final approval to the Board Decree and the City Decree.

While Judge Pointer's rulings were on appeal to the Eleventh Circuit, the lawsuits which would comprise this consolidated litigation were filed, alleging that actions taken by the Board pursuant to the Board Decree adversely affected the rights of non-minorities to equal employment opportunities. Appendix p. 110a.

Upon completion of discovery, a trial commenced on December 16, 1985, focusing exclusively upon promotions in the Birmingham Fire and Rescue Service and the City's Engineering Department. Aside from minor references to the Board Decree and the Board's practices and procedures in conjunction therewith, the trial centered upon the City's personnel selection criteria and, specifically, allegations that the City was promoting blacks over demonstrably more qualified whites. At the conclusion of the Plaintiffs' case, the District Court granted the Board's motion to Dismiss pursuant to Rule 41 (b) of the Federal Rules of Civil Procedure, finding that the Plaintiffs had failed to establish any unlawful discrimination by the Board. After the conclusion of the trial, the District Court entered rulings in favor of the remaining Defendants.

The Plaintiffs appealed from the District Court's orders in favor of the City. No appeal, however, was taken from the District Court's decision granting the Board's Motion to Dismiss.

On appeal, the Board argued that the Respondents had failed to properly appeal the dismissal of claims against the Board. The Eleventh Circuit neglected to address this question, observing, without explanation, that the Board was only a "nominal party" to the appeal (833 F.2d at 1497 n.17; Appendix p. 11a). On the substantive issues raised on appeal, the Eleventh Circuit specifically held that nonparties to the City and Board Decrees were not precluded from bringing independent Title VII actions against the City and the Board for actions taken pursuant to the terms of their respective decrees. 833 F.2d at 1498 (Appendix p. 12a, 13a). The panel also instructed the District Court, on remand, to afford the consent decrees no greater weight than a voluntary affirmative action plan in assessing the validity of the Board's and City's defenses to the claims of reverse discrimination asserted against them. 833 F.2d at 1505 (Appendix p. 19a). As will be demonstrated hereunder, this holding is incorrect.

REASONS FOR GRANTING THE WRIT

I. This Case Affords An Opportunity To Address Authoritatively The Issue Presented By *Marino v. Ortiz* And To Resolve The Conflict Of Decisions Among The Courts Of Appeals.

In *Marino v. Ortiz*, ... U.S. ....., 108 S.Ct. 586 (1988) the Court was presented with and considered the identical issue raised herein: "whether a District Court may dismiss as an impermissible collateral attack a lawsuit challenging a consent decree by nonparties to the underlying litigation, . . ." 108 S.Ct. at 587 (1988). This important issue, however, effectively remains open because the Court, as it was then constituted, was equally divided. The addition of a new Justice now makes it possible to resolve this issue definitively by clarifying the existing uncertainty concerning the validity of after-the-fact challenges to consent decrees like those involved here.

The Courts of Appeals of six Circuits have ruled that consent decrees, such as those at issue here, are not subject to col-

lateral attack. *Culbreath v. Dukakis*, 630 F.2d 15, 22-23 (1st Cir. 1980); *Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986), *aff'd*, 108 S. Ct. 586 (1988); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied*, 464 U.S. 900 (1983); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 558 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Dennison v. City of Los Angeles Department of Water & Power*, 658 F.2d 694, 696 (9th Cir. 1981).

On the other hand, the Eleventh Circuit, in reaching a contrary conclusion, failed to give appropriate weight to fundamental policy considerations militating against collateral attack on Title VII consent decrees. For example, voluntary compliance with Title VII, including voluntary settlement of disputed Title VII claims, is an essential tool in achieving the ultimate policy goal of eliminating discrimination in employment. The Eleventh Circuit's decision not only discourages voluntary compliance undertaken in conformity with court-approved consent decrees by vastly expanding the number of litigants who can question such compliance, but also substantially increases the threat of endless litigation. Necessarily concomitant with the prospect of duplicative litigation is the risk of imposing inconsistent obligations upon employers. Once collateral attack is permitted, it becomes possible for a judicially approved settlement to be approved for policy reasons and then, under the same facts, to be materially changed, altered or abandoned for conflicting or different policy reasons at a subsequent time. Moreover, as an incident to the uncertainty engendered by the approach which the Eleventh Circuit has now embraced, the integrity of the trial court's role in the consent decree process is undermined, if not as a matter of fact then certainly as a matter of perception among litigants and others affected by the decree. Such results are particularly difficult to justify where, as here, those belatedly asserting a perceived right to undo a court-sanctioned resolution of claims were afforded, but chose to bypass, every reasonable opportunity to

protect their interests from the outset by intervening in litigation.

II. The Decision Below Diminishes The Effectiveness Of The Consent Decree As A Means Of Implementing The Purposes Of Title VII.

The practical consequences of the Eleventh Circuit's conclusion that a consent decree settlement is entitled to no greater weight than a voluntary affirmative action plan are particularly troublesome. As Judge Anderson observed in his dissent below, "[i]t would be anomalous for the City to be liable to the instant plaintiffs for action that the City was required to take on pain of being held in contempt . . ." 833 F.2d at 1502 (Appendix p. 22a).

There are fundamental conceptual and practical differences between consent decrees and voluntary affirmative action plans. First of all, a consent decree is in no realistic sense "voluntary" after it receives court approval. The parties are then bound and, during the pendency of the decree's effect, remain subject to the full array of judicial sanctions available to federal judges in civil cases. In contrast, an employer that violates its own affirmative action plan faces only the prospect of potential litigation. More specifically, an employer found to be in violation of a court-approved decree faces contempt proceedings, while an employer that violates its own voluntary affirmative action plan does not. The remedial purpose of Title VII is, therefore, better served by recognizing the enhanced status and binding effect of a consent decree.

Second, the context in which an affirmative action plan is developed clothes it with much less inherent authority or respect than that which imbues a court-approved decree. For the most part, affirmative action plans are developed in private, non-adversarial environments while consent decree settlements are usually the result of difficult multi-party negotiations in contested litigation. Moreover, because the decree is approved and, to some extent, overseen by a federal judge, rather than a

corporate or public officer, it is presumably entitled to a greater degree of credibility and reliance than even the best laid affirmative action plan. Further, the decree is a method of cutting short litigation, while the voluntary plan is a means of preventing it in the first instance.

As the Eleventh Circuit acknowledged, less than one page after it refused to afford the consent decree in this case any more deference than that given to a voluntary program, the district court retains jurisdiction over the case in which it has entered a consent decree. 833 F.2d at 1501 (Appendix p. 20a). Therefore, the plan embodied in the decree is supervised on an ongoing basis to assure its proper implementation. To reiterate, the employer faces a contempt citation for violations of the decree, which, in and of itself, makes compliance completely different from compliance with a voluntary plan.

The concept of a consent decree was addressed in *Local No. 93, Intern. Ass'n of Firefighters v. City of Cleveland,* 478 U.S. 501, 106 S.Ct. 3063 (1986). While recognizing the voluntary nature of these decrees, the Court in *Local No. 93* evaluated the "dual character" of a consent decree, by observing whether the decree is to be treated as a contract, or as a judgment, depends upon the context. 106 S.Ct. at 3074. In the context presented by this case – where nonparties to the decree seek to attack action taken in observance of the decree as a violation of Title VII – the factors recognized in *Local No. 93* as indicative of the judgment aspect of a consent decree are important. For example, under *Local No. 93* "a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction" and must "come within the general scope of the case made by the pleadings". 106 S.Ct. at 3077 (citation omitted). The court retains the power to modify the decree, even over the objection of a litigant; this power may remain unused, or may be exercised to supervise the parties and interpret the decree over a period of years after the decree is entered. *See* 106 S.Ct. 3076 & nn. 12, 13. This continuing jurisdiction affords the court a greater degree of flexibility in enforcing the decree than it would have in a case where a judgment is entered after trial. 106 S.Ct. at 3076 n. 13. Simply stated, a federal court does not act merely as a "recorder of contracts". 106 S.Ct. at 3077. Rather, it lends the authority of the federal courts to the provisions of the decree; its "power to modify the consent decree is the same as [its] power to modify a litigated decree, . . ." 106 S.Ct. at 3078. Accordingly, the inherently judgmental nature of a consent decree entitles it to more deference than a voluntary affirmative action plan.

Further, because the Eleventh Circuit's holding leaves open the possibility that the Board may be held liable for actions that it took in reliance on the consent decree, it directly contradicts both the letter and the spirit of Section 713(b) of Title VII, 42 U.S.C. § 2000e-12(b). This statute provides that an employer shall not be subject to liability for acting in conformity with, and in reliance on, a written interpretation of the Equal Employment Opportunity Commission ("EEOC"). The *Affirmative Action Guidelines,* promulgated by the EEOC pursuant to Title VII, provide that a party is entitled to rely upon an order of a court of competent jurisdiction, whether that order is entered by consent or after contested litigation. 29 C.F.R. § 1608.8. Accordingly, a party to a consent decree is entitled to rely upon compliance therewith to a much greater extent than mere voluntary compliance with an affirmative action plan.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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Counsel of Record

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March 31, 1988

(3) (2) (2)

Nos. 87-1614, 87-1639, 87-1668

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In The

Supreme Court of the United States

October Term, 1987

JOHN W. MARTIN, *et al.*,

v. *Petitioners,*

ROBERT K. WILKS, *et al.*,

Respondents.

PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,

v. *Petitioners,*

ROBERT K. WILKS, *et al.*,

Respondents.

RICHARD ARRINGTON, JR., *et al.*,

v *Petitioners,*

ROBERT K. WILKS, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT OF RESPONDENTS ROBERT K. WILKS, *et al.*

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QUESTIONS PRESENTED

1. Is a public employer immune from the discrimination claims of unconsenting nonminority employees if it claims to act pursuant to a consent decree which contemplates race conscious employment decisions?

2. Should a consent decree embodied affirmative action plan be treated as any other affirmative action plan when a nonparty challenges race conscious actions of an employer taken pursuant to the consent decree as discriminatory and beyond the scope of permissible affirmative action?

3. Is a public employer acting within the scope of permissible affirmative action when it promotes on a one black to one white basis, makes no findings of past purposeful promotional discrimination, does not consider the relative qualifications of the promotional candidates, and does not attempt to use any job related selection procedure?

PARTIES TO THE PROCEEDINGS BELOW

Private Plaintiffs

Robert K. Wilks
James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
Dudley L. Greenway
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Phillip H. Whitley
Marshall G. Whitson
David H. Woodall

Plaintiff-Intervenor

United States of America

City Defendants

Richard Arrington, Jr.
City of Birmingham

Personnel Board Defendants

Personnel Board of Jefferson County
Roderick Beddow, Jr.
Joseph W. Curtin
James W. Fields
Patricia Hoban-Moore
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Defendant-Intervenors

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas
Wanda Thomas

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Nos. 87-1614, 87-1639, 87-1668

In The

Supreme Court of the United States

October Term, 1987

JOHN W. MARTIN, *et al.*,

v. *Petitioners,*

ROBERT K. WILKS, *et al.*,

Respondents.

PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,

v. *Petitioners,*

ROBERT K. WILKS, *et al.*,

Respondents.

RICHARD ARRINGTON, JR., *et al.*,

v. *Petitioners,*

ROBERT K. WILKS, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT OF RESPONDENTS ROBERT K. WILKS, *et al.*

Respondents Robert K. Wilks, *et al.* respectfully submit this brief in opposition to issuance of a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

CITATIONS TO OPINIONS BELOW

Petitioners' citations of the decision of the Court of Appeals are correct.

Petitioners' citation of the decision of the District Court as *In re Birmingham Reverse Discrimination Employment Litigation*, 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. Dec. 20, 1985) is misleading.[1] The record entries which together constitute the final decision of the District Court are reprinted by petitioners in the Appendix at 27a - 76a. And, petitioners have provided a final compilation of the district court's findings in the Appendix at 77a - 109a.

JURISDICTION

Respondents agree with the petitioners' allegations of jurisdiction to consider the Petitions.

[1] As noted by petitioners Arrington, *et al*, petition at 2 n.2, the FEP reported decision does not contain additional post-trial findings, conclusions and modifications of the District Court's order which were made upon consideration of respondents' Rule 59 Motion. App. at 69a - 76a.

STATEMENT OF THE CASE

Respondents Robert K. Wilks, *et al.* are fifteen individual white male employees of the City of Birmingham Fire & Rescue Service ("BFRS") and one white male employee of the City's Engineering Department.[2] App. at 82a, ¶ 1. Each would have been promoted to a position as a Fire Lieutenant or Fire Captain or Civil Engineer but for the race conscious actions of the City of Birmingham ("City"). App. at 79a. Beginning in April 1982, these respondents filed individual suits against the City, its Mayor, and the Personnel Board of Jefferson County defendants ("Personnel Board") under Title VII and the Equal Protection Clause.[3]

The defense rested on claims of compliance with consent decrees entered in *United States v. Jefferson County*, 28 FEP Cases (BNA) 1834 (N.D. Ala. 1981). App. at 37a.

[2] In addition, an association of employees of the City is a plaintiff-respondent. App. at 67a.

[3] Claims under 42 U.S.C. § 1981 and state law were also alleged. The suits were filed at the time of the denial of promotional opportunities to the individual plaintiffs, and, in most cases, after exhaustion of administrative remedies before the Equal Employment Opportunity Commission. While the first two complaints made reference to the consent decrees, and sought preliminary relief against implementation of race conscious promotions, the later complaints made no reference to the decrees and simply sought relief due to the discriminatory conduct of the defendants. *Compare*, Wilks complaint, R17-1-1, *et seq.*, to Bennett complaint, App. at 110a.

Those decrees were entered in settlement of race and sex discrimination cases filed in 1974 and 1975 by various private parties and the United States.[4] App. at 236a - 246a. After the proposed consent decrees with the City and Personnel Board were announced in June 1981, the Birmingham Fire Fighters Association filed objections to certain decree provisions as required by the public notice. App. at 238a. A "fairness hearing" was held by the District Court on August 3, 1981, App. at 238a, and the decrees were approved on August 21, 1981, App. at 247a. Prior to entry of the decrees, the union sought to intervene in the consent decree cases. The consent decree parties vigorously opposed intervention by the union. The union's motion was denied at the time of entry of the District Court's order approving the consent decrees. App. at 246a.

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[4] In 1977, the District Court found that the entry-level Police Officer and Firefighter tests used by the Personnel Board adversely impacted upon black applicants and were not shown to be job-related under the EEOC Guidelines. The trial court further found that the Personnel Board had not intentionally discriminated against blacks, was not guilty of a constitutional violation, and, in fact, had made efforts for several years to bring blacks into public employment. *Ensley Branch, NAACP v. Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 at 6795 (N.D. Ala. 1977). The assertion by the Martin petitioners that the court ordered the Board to certify "for promotion specified ratios of blacks and whites" is false. Martin petition at 6. At no time has any finding been made by the District Court regarding promotional examinations used by the Board. Nor were any findings of discrimination made against the City of Birmingham.

The Court of Appeals for the Eleventh Circuit upheld the denial of intervention by the union. The appeals court found that no prejudice should result to the union or its members because entry of the decrees would not preclude an individual nonparty harmed by the City's implementation practices from asserting an independent claim of discrimination. *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983). The Court also recognized that the individual plaintiffs could not file suit until they were personally denied promotion after approval of the settlement. No party sought review by this Court.

During April 1984 the District Court consolidated the various discrimination claims of the respondents and other nonminority City employees under the master caption file *In re: Birmingham Reverse Discrimination Employment Litigation*. It was later determined to first try the claims of the BFRS and Engineering Department plaintiffs. In an effort to narrow the scope of pretrial preparation, the District Court entered pretrial orders finding that the respondent plaintiffs were required to prove that the promotions of the black promotees were not required by the terms of the consent decrees. App. at 27a, 28a. In those orders, the District Court summarily found without a trial, summary judgment motion, or other hearing, that the consent decrees were valid and lawful. See, *In re: Birmingham Reverse Discrimination Employment Litigation*, 37 FEP Cases (BNA) 1 (N.D. Ala. 1985); Transcript of May 14, 1984 hearing, at 20-22. Consent decree compliance, rather than the standards of Title VII or the Equal Protection Clause, became the only

issue for trial. And, respondents were limited by the trial judge to present evidence on that single issue.[5]

At the conclusion of the five day bench trial, the District Court found that the respondents had failed to prove that the contested promotions were not required by the terms of the City consent decree. It therefore upheld the promotions, repeating again without explanation its previously announced ruling that the City consent decree "is lawful." App. at 106a.

The Court of Appeals for the Eleventh Circuit reversed finding that respondents had never been given a trial on their individual Title VII or Equal Protection claims. *In Re: Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1500 (11th Cir. 1987); App. at 17a. The appeals court held, as to nonparties such as respondents Wilks, *et al.*, a consent decree embodied affirmative action plan is entitled to no more preclusive effect against that nonparty than a voluntary affirmative action plan. The District Court was directed on remand to evaluate the race based conduct of the petitioners under the standards of *Johnson v. Transportation Agency*, 480 U.S. ___, 94 L.Ed.2d 615 (1987) (Title VII) and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (Equal Protection Clause). 833 F.2d at 1500, 1501; App. at 19a. Finally, the appeals court noted that the District Court's interpretation of the language of paragraph 2 of the City consent decree that it "permits the City to make race conscious promotions without using *any* job-related selection procedure" creates a natural potential for the trammelling of the interests of nonminority employees which warranted "heightened scrutiny" by the District Court on remand. 833 F.2d at 1501; App. at 19a, 20a (emphasis in original).

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[5] The Court determined that the only factual issue was whether, under the terms of the consent decree, the black promotees were demonstrably less qualified than the respondents. Paragraph 2 of the City Decree provides: "Nothing herein shall be interpreted as requiring the City to . . . promote a person who is not qualified, or to . . . promote a less qualified person in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure." App. at 124a. The City contended that paragraph 2 had never been "invoked" by the City, and it was therefore irrelevant and not considered in making promotions. Indeed, the City admitted, and the District Court found, that the City promoted the black candidates without consideration of the relative qualification of all candidates. App. at 105a. In addition, the District Court required the respondent plaintiffs to prove that the City knew at the time of promotion that the black promotees were demonstrably less qualified. App. at 28a, 29a.

ARGUMENT

I. The Court of Appeals Correctly Ruled That A Consent Decree Does Not Immunize A Defendant From the Discrimination Claims of Nonparties.

A. This Court has already decided that a Title VII consent decree is akin to a voluntary affirmative action plan.

Just two terms ago, this Court discussed the voluntary nature of a Title VII consent decree in *Local No. 93*

v. City of Cleveland, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986). Noting that the obligations of a consent decree are created by the agreement of the parties rather than the force of law, this Court recognized that "the voluntary nature of a consent decree is its most fundamental characteristic." *City of Cleveland*, 92 L.Ed.2d at 423. Indeed, this Court likened the entry of a consent decree in settlement of discrimination litigation to other permissible voluntary affirmative action by employers or unions designed to eradicate the effects of past discrimination. The only difference, this Court held, is the additional remedy, to which the parties have voluntarily submitted, of the court's contempt power to ensure an employer's compliance with a consent decree embodied affirmative action plan. 92 L.Ed.2d at 424. This Court went on to recognize that, given the managerial discretion reposed in employers to voluntarily adopt affirmative action plans that might include relief broader than that which a court could order under § 706(g), a district court is authorized to enter a consent decree containing a voluntary affirmative action plan in settlement of discrimination litigation. Due to its voluntary nature, a consent decree is, therefore, not the sort of court order subject to the limitations placed on the orders of federal courts by § 706(g) of Title VII. *City of Cleveland*, 92 L.Ed.2d at 423. Without holding that the affirmative action aspects of a consent decree are the equivilent of a voluntary plan, this Court could not have reached the result in *Cleveland*.

The *Cleveland* Court cautioned, however, that "the fact that the parties have consented to the relief

contained in a [consent] decree does not render their action immune from attack on the ground that it violates § 703 of Title VII or the Fourteenth Amendment." *Cleveland*, 92 L.Ed.2d at 426. Finally, this Court refused to allow an unconsenting union to block entry of a consent decree wherein plaintiffs and an employer resolve their differences through adoption of a decree embodied affirmative action plan. 92 L.Ed.2d at 427, 428.

The Eleventh Circuit panel correctly followed *Cleveland* when it wrote:

> . . . even if a consent decree purports to affect the rights of third parties, those parties are not bound by the terms of the decree unless their interests were adequately represented by a party to the decree. *See Local No. 93 v. City of Cleveland*, ___ U.S. ___, 106 S.Ct. 3063, 3079, 92 L.Ed.2d 405 (1986) ("A courts approval of a consent decree between some of the parties . . . cannot dispose of the valid claims of nonconsenting [parties]; if properly raised, these claims remain and may be litigated by the [nonconsenting parties]".) The policy of encouraging voluntary affirmative action plans must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed. See *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 589 n.4, 104 S.Ct. 2576, 2593 n.4, 81 L.Ed.2d 483 (1984) (O'Connor, J., concurring) ("The policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees.").

833 F.2d at 1498; App. at 14a, 15a.

Following this Court's decision in *Cleveland*, the Eleventh Circuit correctly held that a consent decree

embodied plan is entitled to no more preclusive effect than one not entered by a court in settlement of discrimination litigation. 833 F.2d at 1498; App. at 13a.[6] There is no need for this Court to revisit the issue.

B. This case involves a different issue and factual context than that which was not resolved in *Marino v. Ortiz*.

During the current term, this Court was equally divided when it considered *Marino v. Ortiz*, No. 86-1415, ___ U.S. ___, 108 S.Ct. 586, 98 L.Ed.2d 629 (Jan. 13, 1988). The issue in *Marino* was "whether a District Court may dismiss as an impermissible collateral attack a lawsuit challenging a consent decree by nonparties to the underlying litigation." In *Marino*, petitioners filed an independent lawsuit asserting an equal protection claim. Their theory was that blacks with test scores equal to those of petitioners should not be promoted under the terms of a consent decree that had been proposed in another case. The Second Circuit panel noted that "[a]lthough [petitioners] had no expectation of promotion since they had failed the examination, they demanded that they too be made sergeants." *Marino v. Ortiz*, 806 F.2d 1144, 1146 (2d Cir. 1986). The

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[6] The Eleventh Circuit's rejection of the no collateral attack doctrine was first announced in *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983). At that time, the appeals court noted that its analysis paralleled the discussion of *Ashley v. City of Jackson*, 464 U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of certiorari). See, *Jefferson County*, 720 F.2d 1511 at 1519 n.20. The *Ashley* dissent was relied upon in this Court's *Cleveland* decision. 92 L.Ed.2d at 423, 428.

appeals court found that the suit was an impermissible effort to block entry of a consent decree that had been proposed in another case.

In *Marino*, petitioners were directly attacking a proposed consent decree in which their interest was speculative at best. At the time of their suit, the petitioners had suffered no harm; and, they had no right or expectation of promotion that was to be denied under the terms of the decree. Rather, petitioners were aggrieved by the fact that blacks who failed the civil service test would receive promotions while they, whites who had failed the same test, would not receive the same treatment. Petitioners' suit was correctly dismissed by the District Court, for the simple reason they were denied nothing on the basis of their race.

In this case, respondents are individual white male employees who exhausted their administrative remedies before the EEOC and filed suit after they were individually denied promotions as a direct result of race conscious actions which respondents contend are not within the ambit of permissible affirmative action. Indeed, respondents' suits are the very actions envisioned by this Court's recent decisions. *See, City of Cleveland*, 92 L.Ed.2d at 428, 429 (O'Connor, J., concurring); and, *e.g., W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983) (employer that voluntarily submits itself to conflicting obligations is cornered by its own actions). See also, *Ashley v. City of Jackson*, 464 U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of certiorari).

The *Marino* case was nothing more than a separate suit to halt entry of a consent decree by nonparties that

would suffer no personal loss or harm as a result of the proposed decree. Here, respondents were not parties to the decree, and directly suffered in the course of the City's implementation of the settlement.

The issue in this case is not the lawfulness of the decrees. Nor is this case a facial attack on the decrees. The issue is the validity of the race conscious *conduct* of the defendants. *Marino* was not that type of case.

C. The Courts of Appeals are now correctly following the *Cleveland* decision.

Petitioners assert that certiorari should be granted because of a split in the decisions of the circuits. Arrington petition at 6; Martin petition at 12; Personnel Board petition at 5, 6. Citing a series of cases from six circuits,[7] and contrary decisions from the Seventh and Eleventh Circuits, the petitioners claim this Court's intervention is necessary to resolve the "no collateral attack" doctrine.

With the exception of the unique facts of *Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986), which follows the

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[7] Petitioners cite *Culbreath v. Dukakis*, 630 F.2d 15, 22-23 (1st Cir. 1980); *Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986), aff'd, 108 S.Ct. 586 (1988); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62 (4th Cir. 1981), cert. denied, 455 U.S. 940 (1982); *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied sub nom. Ashley v. City of Jackson*, 464 U.S. 900 (1983); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 558 (6th Cir. 1982), rev'd on other grounds, *sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Dennison v. City of Los Angeles Dept. of Water & Power*, 658 F.2d 694, 696 (9th Cir. 1981). See Arrington petition at 6.

Second Circuit's earlier decision in *Prate v. Freedman*, 430 F.Supp. 1373 (W.D.N.Y.) *affirmed mem.*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978), all of the "no collateral attack" cases cited by petitioners predate this Court's decision in *Local No. 93 v. City of Cleveland, supra* by several years. And, the two circuits which have addressed the issue on a clean slate since the *Cleveland* decision have rejected the no collateral attack doctrine. *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1987); *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987). Respondents suggest that since *Cleveland* was decided, the Courts of Appeals have correctly rejected the "no collateral attack" doctrine. Assuming there was once a conflict among the circuits, that conflict was resolved by *Cleveland* and simply no longer exists.

D. The Court of Appeals correctly recognized the fundamental unfairness of binding a non-party to an agreement he had no part in making.

The Court of Appeals recognized that due process mandates that a party have an opportunity to be heard if he is to be bound by a judgment:

> It is a fundamental premise of preclusion law that "[a] nonparty to a prior decision cannot be bound by it unless he had sufficient identity of interest with a party that his interests are deemed to have been litigated." *Wilson v. Attaway*, 757 F.2d 1227, 1237 (11th Cir. 1985). As the Supreme Court has emphasized, this premise is required by due process: "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co. v.*

Shore, 439 U.S. 322, 327 n.7, 99 S.Ct. 645, 649 n.7, 58 L.Ed.2d 552 (1979).

833 F.2d at 1498; App. at 13a. Finding that the individual plaintiff-respondents were neither parties nor privies to parties to the consent decrees, their claims did not accrue until after the decrees became effective and the challenged promotions made, and their union's appearance at a fairness hearing could hardly be deemed sufficient to make them parties to the decrees, the appeals court refused to bind the nonminority plaintiff-respondents to the terms of the decrees.[8]

Petitioners claim the employer should be immune from discrimination claims because of its new-found penchant toward voluntary compliance with Title VII. The logical conclusion from their argument is that respondents' individual rights under the Constitution can be surrendered at the will of their employer. This Court has consistently recognized the strong public policy in favor of voluntary compliance with this nation's laws designed to eradicate discrimination. See, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). But, individual rights cannot be sacrificed under the guise of voluntary compliance. *Alexander* recognized that "there can be no prospective waiver of an employee's rights under Title VII. . . .Title VII's strictures are absolute and represent a congressional concern that each employee be free from discriminatory practices." 415 U.S. at 51. More recently this Court rejected the notion

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[8] *See*, 833 F.2d 1498, 1499; App. at 15a. The District Court's finding that neither plaintiffs, nor their privies, were parties to the decrees, App. at 105a, is not clearly erroneous.

that employment opportunities may be prospectively waived or allocated among racial groups at the expense of unconsenting individuals. See, *Connecticut v. Teal*, 457 U.S. 440, 453 (1982) ("Section 703(a)(2) prohibits practices that would deprive or tend to deprive '*any individual* of employment opportunities.' "); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 90 L.Ed.2d 260, 273 n.8 (1986) ("Constitution does not allocate constitutional rights to be distributed like bloc grants within discrete racial groups," and, a race based plan "cannot justify the discriminatory effect on some individuals because other individuals had approved the plan.") (Powell, J., joined by Burger, Ch.J., and Rehnquist, J.). Indeed, whether the respondents could have intervened in the consent decree case is not the issue.[9] These individual nonminority employees were denied promotions on the basis of their race and have yet to have a day in court to assert that the *conduct* of the defendants is outside the scope of constitutional affirmative action. No union, employer, other third party, or district judge conducting a "fairness hearing," should be able to waive that right of the individual to be free from discriminatory practices.

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[9] It is curious that the City, which vigorously and successfully opposed intervention by the union in the consent decree cases, now claims that these individual respondents "intentionally bypassed[ed] an adequate opportunity to intervene. . . ." Arrington petition at 8. See also, *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).

II. The Court of Appeals Properly Remanded With Instructions to Carefully Evaluate the Race Conscious Conduct of the Defendants.

A. *Wygant v. Jackson Board of Education* and *Johnson v. Transportation Agency* provide the correct standards to review a public employer's voluntary race based conduct.

The District Court was directed to evaluate the defendant's voluntary race based conduct under this Court's recent decisions in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (Constitution) and *Johnson v. Transportation Agency*, 480 U.S. ___, 94 L.Ed.2d 615 (1987) (Title VII). The fact that those cases involved voluntary plans rather than consent decrees is irrelevant. The appeals court wrote: "In both instances, the employer has embarked on a voluntary undertaking; we reject any notion that the memorialization of that voluntary undertaking in the form of a consent decree somehow provides the employer with extra protection against charges of illegal discrimination." 833 F.2d at 1501; App. at 19a. Indeed, that is the logical inference one must draw from this Court's *Cleveland* decision.

In *Johnson, supra,* this Court gave lower courts much needed direction and guidance on the parameters of an affirmative action plan which passes muster under Title VII. Drawing heavily upon Justice Powell's process of evaluation for voluntary race based conduct in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), this Court found that a plan which takes race into account may use race as a single "plus"

factor in evaluating the relative qualifications of the candidates. No position should be set-aside solely on the basis of race; and, a realistic goal should be based on the availability of blacks or women in the relevant labor pool.

In this case, the District Court found that the City never compared relative qualifications, made no attempt to use a job-related selection procedure, and simply alternated between blacks and whites in making promotions. App. at 69a - 75a, 105a, 106a.[10] Moreover,

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[10] The testimony of Birmingham Fire Chief Gallant illustrates the City's failure to consider qualifications in making promotional decisions:

> Q. At the time [black promotee] Tony Jackson was promoted to Captain, did you form a judgment as to whether he was qualified to perform the duties of a Captain?
>
> A. No, I did not.
>
> Q. You did not?
>
> A. No, I did not.
>
> Q. . . . At the time you promoted Tony Jackson to Captain, did you compare his qualifications to perform the duties of Fire Captain to those of [white candidate] David Brand?
>
> A. I did not.
>
> Q. At the time you promoted Tony Jackson to Captain, did you compare his qualifications to perform the duties of Fire Captain to those of [white candidate] Mickey Martin?
>
> A. I did not.

PX 31, pages 325, 326.

the City arbitrarily employed an annual Fire Lieutenant promotional ratio of 50% when blacks comprised only nine to thirteen percent of the potentially qualified labor pool from which Fire Lieutenants are drawn. App. at 106a. Indeed, Birmingham's "plan failed to take distinctions in qualifications into account," and dictated "mere blind hiring by the numbers." *Johnson*, 94 L.Ed.2d at 633, 634. Race was not a single plus factor considered in making promotional decisions by Birmingham's Fire Chief, it was the only factor. Moreover, in view of the relatively small qualified black labor pool, this one-for-one promotional plan is hardly narrowly-tailored.

B. The District Court was properly directed to subject Birmingham's race based conduct to heightened scrutiny on remand.

Noting that under the District Court's interpretation of the consent decrees, the City was permitted to not use *any* job-related selection procedure in selecting Fire Lieutenants, the appeals court directed that the decree embodied plan be subjected to "heightened scrutiny" on remand because of the increased potential for trammelling under such an arrangement. App. at 20a.[11]

It is beyond peradventure that courts should examine with extreme care any race based conduct by a public actor. This Court has "consistently repudiated '[d]istinctions between citizens solely because of their

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[11] When it approved the decrees in 1981, the District Court employed the "reasonableness" standard, Appendix at 238a, 246a, which was rejected in *Wygant*, 90 L.Ed.2d at 272, 281.

ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality,' " *Loving v. Virginia*, 388 U.S. 1, 11 (1967) quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Thus, the scope of judicial inquiry in cases where racial distinctions are involved is necessarily more intense. "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the *most exacting judicial examination.*" *Regents of University of California v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J., joined by White, J.) (emphasis added). "Any preference based on racial or ethnic criteria must necessarily receive *most searching examination . . .* " *Fullilove v. Klutznik*, 448 U.S. 448, 491 (1980) (Burger, Ch.J.) (emphasis added). The "means chosen by a state to accomplish its race conscious purposes" must meet "a *more stringent standard*". *Wygant v. Jackson Board of Education*, 476 U.S. 276, 90 L.Ed.2d 260, 272 (1986) (Powell, J.) (emphasis added). "[R]acial classifications of any sort must be subjected to '*strict scrutiny*,' however defined". *Wygant*, 90 L.Ed.2d at 275 (O'Connor, J., concurring in part) (emphasis added). Under the foregoing decisions, heightened, searching, stringent, exacting or strict scrutiny are all appropriate when considering race based conduct of a public actor. The admonition to the District Court to employ "heightened scrutiny" was well within the guidelines of this Court's decisions.

III. If Certiorari is Granted, This Case Provides an Appropriate Opportunity for a Reexamination of *Steelworkers v. Weber.*

The Court of Appeals properly followed this Court's precedents in directing the District Court to use the formulas for evaluation of race based conduct of *Johnson* (Title VII) and *Wygant* (Constitution). Consequently, these respondents believe certiorari is due to be denied in this case. But, these respondents are also aware that, in view of the affirmance of *Marino,* the Court may wish to consider Question 1 (no collateral attack doctrine). Should the Court grant the petitions, its review should reach the appropriate standards for review of the defendants' conduct and the continued viability *vel non* of *Steelworkers v. Weber*, 443 U.S. 193 (1979).[12] *Johnson* is built upon this Court's decision in *Weber*. In *Johnson*, Justice O'Connor suggested that the result reached was determined by *Weber*, and no party was suggesting that *Weber* be overruled. *Johnson v. Transportation Agency*, 480 U.S. ___, 94 L.Ed.2d 615, 641 (1987) (O'Connor, J.). Justices White, Scalia, and the Chief Justice wrote that *Weber* should be overruled. *Id.*, 94 L.Ed.2d at 647, 657.

This case presents an appropriate opportunity to reconsider *Weber*. The instructions of the Court of Appeals are expressly premised upon *Weber, Johnson* and *Wygant*. The petitioners have claimed that the

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[12] These respondents suggested to the Court of Appeals that *Weber* should be overruled. See, Supplemental Brief of Wilks, *et al.*, at 10.

appeals court incorrectly applied *Weber* and *Johnson*. Martin petition at 14-20. This case contains a complete record of the proceedings which resulted in the consent decrees, the conduct of the defendants in implementing their plan, and the relative qualifications of the competing white and black candidates. Reconsideration of *Weber* would be appropriate in this case.

CONCLUSION

Respondents Robert K. Wilks, *et al.* respectfully urge the Court to deny the petitions for writ of certiorari to the Court of Appeals for the Eleventh Circuit. If the petitions are granted, *Weber* should be reconsidered in the process of this Court's review.

May 20, 1988

Respectfully submitted,

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether individuals who were neither parties to nor intervenors in a Title VII suit may be barred from challenging employment-related actions taken under consent decrees entered in that litigation.

2. Whether the court of appeals properly instructed the district court on remand to evaluate the consent decrees under the standards articulated in *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987).

3. Whether consent decrees and voluntary affirmative action plans should be evaluated differently for purposes of Title VII and the Equal Protection Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1614

JOHN W. MARTIN, ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

No. 87-1639

PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

No. 87-1668

RICHARD ARRINGTON, JR., ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-24a) is reported at 833 F.2d 1492. The district court's initial findings of fact and conclusions of law (Pet. App.

27a-66a) are reported at 39 Fair Empl. Prac. Cas. (BNA) 1431. The district court's additional findings of fact (Pet. App. 69a-76a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1987. Timely petitions for rehearing were denied on January 25, 1988 (Pet. App. 25a). The petition for a writ of certiorari in No. 87-1614 was filed on March 30, 1988; the petition for a writ of certiorari in No. 87-1639 was filed on April 1, 1988; and the petition for a writ of certiorari in No. 87-1668 was docketed as of March 31, 1988. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1974, the Ensley Branch of the National Association for the Advancement of Colored People and seven black individuals filed separate class action complaints in the United States District Court for the Northern District of Alabama against the City of Birmingham (City), the Personnel Board of Jefferson County, Alabama (Board), and other local government officials (Pet. App. 3a-4a). The complaints alleged that the City and Board had engaged in racially discriminatory hiring and promotion practices in various public service jobs, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1981 and 1983 (Pet. App. 4a & n.3). In May 1975, the United States filed a similar complaint against the City and Board, alleging a pattern of discriminatory hiring practices against blacks and women (*ibid.*).

The district court consolidated the three cases and held a bench trial in December 1976 limited to the issue of the

validity of police and firefighter entry-level tests used by the City and the Board. In January 1977, the court found that the tests adversely affected black applicants and were not sufficiently job-related and thus held that the tests were discriminatory in violation of Title VII (Pet. App. 4a). See *Ensley Branch of the NAACP* v. *Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 (N.D. Ala. 1977), aff'd, 616 F.2d 812 (5th Cir.), cert. denied, 449 U.S. 1061 (1980).

In August 1979, the district court held a second trial concerning the validity of other testing and screening devices used by the Board. Before the court issued its decision, however, the parties entered into ultimately fruitful settlement negotiations. Pet. App. 4a-5a. In June 1981 the plaintiffs and the United States jointly entered into two consent decrees—one with the City (Pet. App. 122a-201a), and one with the Board (*id.* at 202a-235a). Although containing no admissions or adjudications of liability, the decrees provided "an extensive remedial scheme, including long-term and interim annual goals for the hiring of blacks as firefighters and the promotion of blacks to the position of fire lieutenant" (*id.* at 5a (footnote omitted)). Paragraph 2 of the decree with the City made clear, however, that (Pet. App. 124a)

> [n]othing herein shall be interpreted as requiring the City to * * * promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure.

2. After entering an order provisionally approving the decrees, the district court, on August 3, 1981, held a fairness hearing to consider objections of interested nonparties (Pet. App. 238a). The Birmingham Firefighters Association 117 (BFA), among others, appeared and filed objections as amicus curiae. After the hearing but before

final approval of the decrees, the BFA and two of its members moved to intervene as of right in each of the three original actions, contending that the proposed decrees would adversely affect their rights. Pet. App. 5a-6a. On August 21, 1981, the district court entered an order approving the consent decrees and denying the motions to intervene as untimely (*id.* at 236a-249a). See *United States* v. *Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981), aff'd, 720 F.2d 1511 (11th Cir. 1983).

3. After entry of the district court's order, seven white firefighters filed a complaint in the district court against the City and the Board. See Pet. App. 110a-121a. The complaint alleged that enforcement of the consent decrees would discriminate against them in violation of Title VII; the complaint sought a preliminary injunction. The district court denied the request for injunctive relief. Pet. App. 6a.

The court of appeals affirmed. *United States* v. *Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).[1] The court held that the white firefighters were not entitled to injunctive relief because of their inadequate showing of irreparable harm (*id.* at 1519-1520). The court also dismissed the firefighters' appeal from the denial of intervention, holding that the district court had not abused its discretion, in part because the firefighters could "institut[e] an independent Title VII suit, asserting the specific violations of their rights" (*id.* at 1518).[2]

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[1] The appeal from the district court's order denying injunctive relief was consolidated with the appeal from the court's order denying intervention (Pet. App. 7a).

[2] In the court of appeals, the United States contended that the motions to intervene were untimely, prejudicial to the parties, and improper under Fed. R. Civ. P. 24(a). See Brief for the United States at 14-26, *United States* v. *Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).

4. After unsuccessfully seeking preliminary injunctive relief, the firefighters pursued their complaint in the district court against the City and the Board. A second group of white firefighters, the *Wilks* respondents, filed a similar complaint against the City and the Board. Pet. App. 7a; see *Wilks* v. *Arrington*, No. CV83-AR-2116-S (N.D. Ala.) (R. 17-1). The complaint alleged that the City and the Board had denied promotions to the white firefighters in favor of certain less qualified black firefighters, in violation of Title VII and the Equal Protection Clause; the complaint further sought to enjoin the City from making those promotions. Pet. App. 7a. Several other city employees who had been denied promotions also filed similar complaints against the City and the Board. In addition, the United States brought suit against the City and the Board, alleging that the City's practice of promoting blacks over demonstrably better qualified white violated, inter alia, Title VII and the Equal Protection Clause. Pet. App. 8a.[3] In April 1984, the district court consolidated the actions under the caption "In re

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[3] The United States, as a signatory to the consent decrees, was originally named as a defendant in two of the "reverse discrimination" actions, as the District Court called them. The district court later granted the United States' motion to intervene as party-plaintiff in the remaining cases. The court also granted the United States' motion to realign itself as plaintiff in the two suits in which it had been named as a defendant. Pet. App. 8a & n.10.

The *Martin* petitioners, as the plaintiffs in the original 1974 action and signatories to the consent decrees, moved both in their individual capacities and as class representatives to intervene as parties-defendant in several suits. The district court permitted the *Martin* petitioners to intervene only in their individual capacities. Pet. App. 9a & n.12.

Birmingham Reverse Discrimination Employment Litigation" (*id.* at 9a).

After a trial in December 1985 concerning only the promotion of blacks in the City's Fire and Engineering Departments, the district court granted the Board's motion to dismiss (Pet. App. 11a, 27a-66a). The court concluded that "[the] plaintiffs cannot collaterally attack the [consent] [d]ecree's validity" (*id.* at 61a), and focused its attention on the City's compliance with paragraph 2 of the consent decree (see page 3, *supra*). The court further held that the *Wilks* respondents and the United States were bound by the consent decrees and concluded that there had been no showing that the City's promotion practices violated paragraph 2 (Pet. App. 10a-11a).

5. On appeals by the *Wilks* respondents, who included one white employee of the City's Engineering Department, and the United States, a divided panel of the court of appeals reversed.[4] The court held that "[b]ecause * * * [the *Wilks* respondents] were neither parties nor privies to the consent decrees, * * * their independent claims of unlawful discrimination are not precluded" (Pet. App. 12a-13a). The court explicitly rejected the "doctrine of 'impermissible collateral attack' " (*id.* at 13a) espoused by other courts of appeals to "immuniz[e] parties to a consent decree from charges of discrimination by nonparties, provided the alleged discriminatory acts were taken pursuant to the consent decree" (*ibid.*). See, *e.g.*, *Dennison* v. *City of Los Angeles Dep't of Water & Power*, 658 F.2d 694 (9th Cir. 1981). The court stated that "[t]he policy of encouraging voluntary affirmative action plans," a rationale for the

[4] The court of appeals affirmed the district court's dismissal of the United States' claims, holding that "the United States is estopped from collaterally attacking the consent decrees because it is a party to them" (Pet. App. 20a). The United States has not sought review of this ruling.

doctrine against collateral attacks, "must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed" (Pet. App. 14a).[5]

In remanding for trial the *Wilks* respondents' claims under Title VII and the Equal Protection Clause, the court of appeals instructed the district court (Pet. App. 19a) "to evaluate the defendant's justification for the challenged promotions under the standards articulated in" *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987). The court further instructed the district court to review the consent decrees with the "heightened scrutiny" (Pet. App. 20a) required by *Johnson*. See *Johnson* v. *Transportation Agency*, slip op. 19-20 (inquiry whether affirmative action plan "unnecessarily trammeled" rights of nonminority employees).

ARGUMENT

Petitioners raise a common issue of substantial importance: whether individuals who were neither parties to nor intervenors in an ongoing Title VII suit may be barred from challenging employment-related actions taken under consent decrees entered in that litigation (87-1614 Pet. 11-14; 87-1639 Pet. 5-7; 87-1668 Pet. 5-9). Moreover, the court of appeals' decision conflicts squarely with a decision of the Second Circuit, which earlier this Term was affirmed by an equally divided Court. *Marino* v. *Ortiz*, No. 86-1415 (Jan. 13, 1988) (per curiam), aff'g by an equally

[5] Judge Anderson dissented, stating that "the appropriate resolution of this case would distinguish between the individual plaintiffs' claim for back pay and their claim for prospective relief" (Pet. App. 22a). Judge Anderson contended that the City should not be liable for back pay (*id.* at 22a-24a). He agreed substantially with the majority, however, that the "plaintiffs are not bound by the consent decree and should be free on remand to challenge the consent decree *prospectively* and test its validity" (*id.* at 24a (emphasis added)).

divided Court, 806 F.2d 1144 (1986). Although the decision below is correct, we agree with petitioners that this Court should grant certiorari to resolve this important and recurring issue in Title VII litigation. The other issues raised by petitioners, however, clearly do not warrant this Court's review. Accordingly, the United States urges this Court to grant certiorari limited to the first question presented in each petition.

1. Last Term, this Court granted certiorari in *Marino* to consider the issue common to these petitions, namely, "whether a District Court may dismiss as an impermissible collateral attack a lawsuit challenging a consent decree by nonparties to the underlying litigation" (slip op. 2).[6] In *Marino*, the Second Circuit barred a collateral attack on a Title VII consent decree by a group of white police officers, suggesting that the "proper course * * * would have been to intervene in the lawsuit from which the consent decree issued" (806 F.2d at 1146).[7] This Court, however, was "equally divided" (slip op. 2) and therefore affirmed the court of appeals' judgment. This case offers this Court an opportunity to address the significant issue left unresolved by *Marino*, an issue that continues to divide the courts of appeals.[8]

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[6] The United States filed a brief as amicus curiae in *Marino*, and is serving a copy of that brief on all parties to the instant proceedings.

[7] In *Marino*, the white police officers had chosen not to intervene in the original lawsuit either to challenge the proposed consent decree or to appeal the district court's approval of the decree (806 F.2d at 1146-1147; slip op. 2).

[8] Apart from the Second Circuit, the Fifth, Sixth, and Ninth Circuits have held that collateral attacks on consent decrees entered in Title VII actions are prohibited. See *Thaggard* v. *City of Jackson*, 687 F.2d 66 (5th Cir. 1982), cert. denied, 464 U.S. 900 (1983); *Stotts* v. *Memphis Fire Dep't*, 679 F.2d 541 (6th Cir. 1982), rev'd on other grounds *sub nom. Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984); *Dennison* v. *City of Los Angeles Dep't of Water & Power*, 658 F.2d 694 (9th Cir. 1981). These decisions, however, predate *Firefighters* v. *City of Cleveland*, No. 84-1999 (July 2, 1986), where this Court stated, in analogous circumstances, that "the fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the ground that it violates * * * Title VII or the Fourteenth Amendment" (slip op. 23). The courts of appeals that have barred collateral attacks thus might well reconsider the vitality of the doctrine in light of *Firefighters*.

The conflict clearly exists between the decision below and that of the Second Circuit in *Marino*, both of which were issued after *Firefighters*. Moreover, the Seventh Circuit has recently suggested that it would follow the Eleventh Circuit and permit collateral attacks on consent decrees. See *Dunn* v. *Carey*, 808 F.2d 555, 559-560 (7th Cir. 1986). The instant case squarely presents this Court with the occasion to resolve this apparently growing conflict.

Moreover, this case presents in stark fashion the dilemma that often confronts litigants in circuits which adhere to the so-called "impermissible collateral attack" rule. The *Wilks* respondents, unlike the petitioners in *Marino*, were members of, and represented by, an organization that had sought to intervene in the underlying litigation before approval of the consent decrees. They filed this separate action only after the district court denied their organization's motion to intervene. Pet. App. 5a-6a; 87-1614 Pet. 13 n.12. Under the circumstances, application of the majority rule would have denied the *Wilks* respondents " '[their] own day in court.' "[9] Indeed, the Chief Justice has criticized the rule for that reason:

> I find myself at a loss to understand the origins of the doctrine of "collateral attack" employed by the lower courts in this case to preclude a suit by parties who had no connection with the prior litigation. * * *
>
> * * * * *

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[9] *Ashley* v. *City of Jackson*, 464 U.S. 900, 902 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from the denial of certiorari) (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449, at 417 (1st ed. 1981)).

> Nonparties have an independent right to an adjudication of their claim that a defendant's conduct is unlawful.

Ashley v. *City of Jackson*, 464 U.S. 900, 901-902 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from the denial of certiorari); see *Corley* v. *Jackson Police Dep't*, 755 F.2d 1207, 1210 (5th Cir. 1985) (suggesting reexamination of rule).

The rule barring collateral attacks on consent decrees has vexed Title VII litigants and continues to divide the courts of appeals. The petitions present this Court with an occasion to resolve the conflict among the courts of appeals and provide valuable guidance to litigants in this important area of federal law. The United States thus joins petitioners in urging this Court to grant certiorari to review that aspect of the court of appeals' judgment concerning collateral attacks on consent decrees.

2. The *Martin* petitioners also contend (87-1614 Pet. 14-20) that the court of appeals' instructions on remand misapply this Court's "standards for evaluating the lawfulness of race-conscious relief under Title VII" (*id.* at 15). This contention is wrong. The court of appeals correctly instructed the district court to apply the factors this Court articulated in *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987), and *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979). See Pet. App. 17a-20a. Contrary to petitioners' suggestion (87-1614 Pet. 18-20), the court of appeals' instruction to "subject the consent decrees to heightened scrutiny" (Pet. App. 20a) does not conflict with *Johnson*. The court of appeals merely reacted to the district court's interpretation of the consent decrees that permitted "the City to make race conscious promotions without using *any* job-related selection procedure" (*ibid.* (emphasis in original)). Where "the natural potential [of] such an arrangement [would] trammel the interests of nonminority employees" (*ibid.*), the court of

appeals quite properly reminded the district court to consider whether the consent decrees "unnecessarily trammeled" plaintiffs' rights. *Johnson*, slip op. 19.[10] In sum, this aspect of the court of appeals' judgment merits no further review.

3. The *Personnel Board of Jefferson County, Alabama* petitioners apparently contend (87-1639 Pet. 7-9) that the court of appeals erred in refusing to acknowledge the differences between consent decrees and voluntary affirmative action plans for purposes of Title VII and the Equal Protection Clause. Petitioners do not cite any authority supporting the proposition that consent decrees and voluntary affirmative action plans should be evaluated under different criteria. This Court, recognizing that "the voluntary nature of a consent decree is its most fundamental characteristic," has suggested, however, that these two remedial devices should be reviewed under similar criteria. *Firefighters* v. *Cleveland*, No. 84-1999 (July 2, 1986), slip op. 19; see *id.* at 15 ("[T]here is no reason to think that voluntary, race-conscious affirmative action such as was held permissible in *Weber* is rendered impermissible by Title VII simply because it is incorporated into a consent decree.").[11] This aspect of the court of appeals' judgment

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[10] The *Martin* petitioners' effort to have this Court effectively determine whether the City's promotion practices violate Title VII is premature. As the court of appeals concluded, the district court has not yet considered the *Wilks* respondents' claims under Title VII and the Equal Protection Clause because of the court's focusing on whether the City and Board violated the consent decrees (Pet. App. 12a). This case, in its current posture, does not present this Court with an occasion to review the legality of the City's actions.

[11] See also *Johnson* v. *Transportation Agency*, *supra* (analysis of voluntary affirmative action plan under Title VII); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (analysis of voluntary affirmative action plan under the Equal Protection Clause).

does not warrant this Court's review.[12]

CONCLUSION

The petitions for a writ of certiorari should be granted, limited to the first question presented in each petition.

Respectfully submitted.

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MAY 1988

[12] The *Arrington* petitoners' request for this Court to grant certiorari to decide "the proper scope of the collateral lawsuit" (87-1668 Pet. 9) is premature. Until the district court hears the *Wilks* respondents' collateral lawsuit against the City, this case does not present this Court with an occasion to consider the contours of such an action.

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

[redacted]D BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, IN SUPPORT OF RESPONDENTS

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The International Association of Fire Fighters, AFL-CIO, respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of the respondents in these cases.

INTEREST OF THE IAFF AS AMICUS CURIAE AND ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

The International Association of Fire Fighters, AFL-CIO, (IAFF) is an unincorporated association comprised of municipal, state, and federal fire fighters throughout the United States and Canada. The current membership includes approximately 153,000 state and municipal fire fighters employed by states, cities, and towns across the United States.

The IAFF's objectives include promoting and securing improved wages, hours, and working conditions of fire fighters through collective bargaining, legislation, legal action, and other appropriate means.

The IAFF here represents the interests of its many members across the country who are employed in cities and towns whose employment rights are now, or may be, affected by the terms of consent decrees entered in settlement of employment discrimination lawsuits to which they are not parties. Most of the jurisdictions employing IAFF members operate pursuant to civil service laws which prescribe procedures for promotions. The legal principles espoused by the Court of Appeals below are perfectly consistent with the precedent of this Court, particularly as set forth in *Local Number 93, Firefighters v. City of Cleveland*, 478 U.S. ——, 92 L.Ed.2d 405 (1986) and *Wygant v. Jackson Board of Education*, 476 U.S. ——, 90 L.Ed.2d 260 (1986). Those principles protect the rights of public employees to challenge decisions of their employers, taken pursuant to settlements of employment discrimination lawsuits brought by others, which constitute unlawful discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Fourteenth Amendment to the U.S. Constitution. The filing of petitions seeking this Court's review of the decision of the Court of Appeals prompts the filing of this brief to point out that the issue of the rights of employees affected, by but not party to, consent decrees has already been settled by this Court. No further review is necessary.

CONCLUSION

For this reason, this motion for leave to file an *amicus curiae* brief should be granted.

Respectfully submitted,

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* in this case is set forth in that motion.

ARGUMENT

THE PETITIONS FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The Court below twice has held that an employee need not intervene in pending employment discrimination litigation in order to preserve his right to challenge actions, taken pursuant to a settlement of such litigation, which adversely affect him and which he believes are the product of unlawful discrimination. In the first instance, *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983), petitioners did not seek review by this Court. Respondents relied upon that earlier ruling and pursued such an independent challenge with the approval of the Court of Appeals. Now, petitioners seek certiorari.

The lower court's application of the traditional concepts of fundamental due process and fair play in these circumstances was entirely appropriate. This Court held in *Local Number 93, Firefighters v. City of Cleveland*, 478 U.S. ——, 92 L.Ed.2d 405 (1986) that a consent decree is indistinguishable from a voluntary affirmative action program in assessing the rights of non-minorities affected by the terms of the settlement. "[A]bsent some contrary indication, there is no reason to think that voluntary, race-conscious affirmative action such as was held permissible in Weber is rendered impermissible by Title VII simply because it is incorporated in a consent decree." 92 L.Ed.2d at 421. *Local 93* tested the effect of Section 706(g) of Title VII on the extent of relief which could be contained in consent decrees. The Court held that the limits on the parties' ability to fashion such court-approved settlements "must be found outside § 706(g)." 92 L.Ed.2d at 423. It noted that this holding does "not suggest that voluntary action by employers or unions is outside the ambit of Title VII regardless of its effect on non-minorities. . . . The rights of non-minorities with respect to action by their employers are delineated in § 703 of Title VII, 42 U.S.C. § 2000e-2 and, in cases involving governmental employees, by the Fourteenth Amendment." 92 L.Ed.2d at 423, n. 11.

This latter principle was enunciated in *Wygant v. Jackson Board of Education*, 476 U.S. ——, 90 L.Ed.2d 260 (1986) as well. Treating the contention that the impact on non-minorities of the racial preference in layoffs was permissible under the Fourteenth Amendment because a majority of the affected non-minority employees did not object to it, Justice Powell explained:

> [W]hen a state implements a race-based plan that requires such a sharing of the burden, it cannot justify the discriminatory effect on some individuals because other individuals had approved the plan. Any "waiver" of the right not to be dealt with by the government on the basis of one's race must be made by those affected. . . . [T]he petitioners before us today are not "the white teachers as a group." They are Wendy Wygant and other individuals who claim that they were fired from their jobs because of their race. That claim cannot be waived by petitioners' more senior colleagues.

90 L.Ed.2d at 273, n. 8.

The Eleventh Circuit's opinion below is wholly consistent with this Court's decision in *Local Number 93, Firefighters*. There, a union which had intervened and presented objections to a proposed consent decree, attempted to block the settlement. This Court held that the union could not, simply by reason of its intervention, "preclude other parties from settling their own disputes and thereby withdrawing from litigation." 92 L.Ed.2d at 427-428. Conversely, the Court held that "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may

not impose duties or obligations on a third party, without that party's agreement." 92 L.Ed.2d at 428. The gist of this holding is that a nonconsenting intervenor may continue to press claims that conduct covered by a consent decree is unlawful. Justice O'Connor specifically so noted in her concurring opinion—"As the Court explains, nonminority [public] employees therefore remain free to challenge the race-conscious measures contemplated by proposed consent decree as violative of their rights under § 703 [of Title VII of the Civil Rights Act of 1964] or the Fourteenth Amendment." 92 L.Ed.2d at 429.

Surely if nonconsenting intervenors retain such rights, even where they have specifically intervened to object to entry of a consent decree, then nonconsenting nonparties should enjoy at least the same modicum of procedural protection. It is the lower court's recognition of the respondents' right to such due process which the petitioner's complain about. The sole result of this Court's denial of a writ of certiorari will be that the respondents will enjoy their day in court on the merits of their claims of unlawful discrimination. Because their claims did not accrue until after the decree was entered, they possessed no claim ripe for presentation and disposition earlier.

The decision of the Eleventh Circuit is so plainly correct and consonant with the principles laid down by this Court in the *Local 93* case, there simply is no reason for this Court to grant the petition and further delay respondents' day in district court.

The petitioners artfully attempt to portray this case as identical to *Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986) which this Court earlier this term affirmed by virtue of an equal division of the Justices. 484 U.S. ——, 98 L.Ed.2d 629 (1988). The portrayal is flawed, however. This case is not the same factual vehicle to resolve the issues which *Marino* presented. *Marino* posed the question whether non-minority employees who could have intervened in litigation brought by minority em-

ployees, but made no attempt to do so, should have been permitted to maintain a separate action claiming that the effect of a consent decree in that litigation was to deny them equal protection of the laws in violation of the Fourteenth Amendment. The U.S. Court of Appeals for the Second Circuit held that the non-minority employees' "proper course . . . would have been to intervene in the lawsuit from which the consent decree issued." 806 F.2d at 1146. That Court of Appeals consequently dismissed the employees' lawsuit as an improper collateral attack on the consent decree. "Attempting intervention . . . was obviously available when they commenced this action, since the final consent decree in that litigation had not yet issued." 806 F.2d at 1147.

In the instant case, the non-minority plaintiffs (respondents) cannot properly be criticized for not attempting intervention before the consent decree was entered. In fact, other non-minority employees did attempt to intervene and were rebuffed in an order affirmed by the U.S. Court of Appeals for the Eleventh Circuit:

> In their motion to intervene, the BFA members could not have alleged that they had suffered any reverse discrimination as a result of the Board's or the City's implementation of the affirmative action plan prescribed by the consent decrees, because the court had not yet approved those decrees. BFA members could present such a claim now, however, since the decrees have been approved and entered. For example, they could do so by instituting an independent Title VII suit, asserting the specific violations of their rights. The consent decrees would only become an issue if the defendant attempted to justify its conduct by saying that it was mandated by consent decree.[18]

---

[18] It should be clear from this discussion that it is not necessary for the BFA members to make a frontal attack on the validity of the decrees between the parties in order to assert a discrimination claim against their employers.

United States v. Jefferson County, 720 F.2d 1151, 1518 (11th Cir. 1983). Thus, due to the earlier order, the respondents had no incentive to intervene. The Eleventh Circuit reiterated in its opinion which is the subject of the petitions for certiorari, "we took pains to point out in *Jefferson County* that the denial of the motion to intervene was not prejudicial to the movants partly because they were not precluded from instituting an independent Title VII suit." Pet. App. p. 15a, n.21.

Clearly, these respondents, unlike the non-minority employees in *Marino*, had a reasonable basis for not acting earlier. Petitioners here took no issue with the earlier order; no petition for a writ of certiorari was filed from the 1983 decision. Thus respondents here justifiably waited for their cause of action to accrue before seeking federal court relief. This fact alone distinguishes this case from *Marino* and renders a grant of certiorari inappropriate.

The entitlement of a non-minority individual to a "day in court" is explicit in *Local 93* and *Wygant*. Moreover, it was held out to the respondents by the Eleventh Circuit in a previous opinion in this same litigation as a rationale for denying intervention to similarly-situated individuals. In short, there is no good reason for this Court to inject itself into the process at this time.

CONCLUSION

For the foregoing reasons, the Amicus requests that the petitions for a writ of certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
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CLERK

Nos. 87-1614, 87-1639, 87-1668

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

JOHN W. MARTIN, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX
Volume I

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Relevant Docket Entries from Courts Below

Bennett, et al. v. Arrington, et al., CV 82-P-850-S

Apr. 14, 1982	Complaint filed-snh.
Apr. 14, 1982	Application of plaintiff for temporary restraining order, filed-snh (del to SCP) See Order dated 04/15/82.
Apr. 15, 1982	Order that the application for TRO is denied, without prejudice to the rights of the parties to bring this cause again before the court filed (POINTER); entered 04/15/82-cm-snh.
Apr. 15, 1982	Summons, complaint, application and order issued - del to USM-snh.
Apr. 19, 1982	Application of plaintiffs for TRO filed-snh.
Apr. 19, 1982	Affidavit of Billy Gray with exhibits attached, filed-snh.
Apr. 22, 1982	Motion of John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard, to intervene as parties defendant with exhibits attached, filed-cs-snh.
Apr. 22, 1982	Affidavit of O. Neal Gallant with exhibits attached, filed-cs-snh.
Apr. 23, 1982	On hearing before the Honorable Sam C. Pointer, Jr. on application of plaintiffs' for temporary restraining order - motion to intervene as party defendants previously filed - granted in part - answer of defendant intervenors to complaint filed - affidavit of Floyd E. Click, 2nd affidavit of Billy Gray, affidavit of James L. Wint, affidavit of Robert Sorrell and affidavit of Larry D. Miskelly, filed - case submitted to the court on various affidavits filed, briefs & complaint & any testimony taken - testimony of plaintiffs' - plaintiffs' rest

	- oral arguments by counsel - findings of fact and conclusions of law dictated into the record by the Court denying the application for temporary restraining order - parties agree the application for temporary restraining order may also be considered and request for preliminary injunction & defendants waive notice - Court so considers and denys [sic] request for preliminary injunction based on same evidence - notice of appeal by plaintiffs filed - motion of plaintiffs' for stay pending appeal filed - denied - Rptr - Mayra Malone - lpc.
Apr. 23, 1982	Clerk's Court Minutes that pursuant to the findings of fact and conclusions of law dictated into the record by the Court, the application of plaintiffs' for a temporary restraining order is DENIED; and the request of plaintiffs' for a preliminary injunction is DENIED based upon the same evidence; and the case is continued for further development and potential trial, filed; entered 04/23/82-cm-snh (Mayra Malone, Court Reporter).
Apr. 26, 1982	Transcript of proceedings had before the Hon. Sam C. Pointer, USDJ, at Birmingham, Ala. on April 23, 1982 - filed -dgs.
May 3, 1982	Answer of defendants, Richard Arrington, Jr. and City of Birmingham, to the complaint, filed-cs-snh.
May 3, 1982	Certified copy of an Order of the USCA, Atlanta that the application of appellants for stay pending appeal is in reality a petition for a restraining order of injunction [sic] pending appeal and the application is DENIED - filed -dgs.
May 27, 1982	Certified copy of an Order of the USCA, Atlanta that the motion of appellants to consolidate the appeals in 74 P

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June 1, 1982	Order of the USCA, Atlanta, that appellees' motion for an order awarding reasonable costs and attorneys' fees is DENIED — filed.
Feb. 21, 1984	Certified copy of Judgment, USCA, dated 12-12-83 and issued as mandate 2-17-84, that the Order of the District Court is AFFIRMED and the plaintiffs-appellants pay to defendants-appellees costs on appeal with slip Opinion and bills of cost attached filed (TJOFLAT, FAY & ANDERSON); record to be returned later - dpb.
Mar. 15, 1984	Motion of plaintiffs to amend complaint, with proposed amendment thereon, filed-cs-s.
Mar. 19, 1984	Motion of defendant-intervenors, Martin, Florence, McGruder, Coar, Thomas, Thomas and Howard, in this and CV 83-AR-2116-S, CV 83-AR-2680-S, CV 82-P-1461-S, and CV 82-P-1852-S, for consolidation, filed-cs-snh. See Order dated 4/2/84.
Mar. 26, 1984	Response of plaintiffs in this and related cases to defendant-intervenors motion for consolidation, filed-cs-slm.
Mar. 27, 1984	Motion of defendant intervenor Wanda Thomas in this and related cases to withdraw from participation in these actions, filed-cs-slm (del to SCP).
Apr. 2, 1984	Order in this and 82-P-1461-S and 82-P-1852-S that these three cases are consolidated with 83-AR-2116-S and 83-AR-2680-S for pretrial purposes, subject to further court order; two cases currently pending before Judge Acker are reassigned to Judge Pointer, filed (POINTER); entered 4/2/84-cm-slm.

Apr. 5, 1984	Motion of plaintiffs in this and related cases for clarification and reconsideration of 3/10/84 order of Judge Acker and 3/30/84 order of Judge Pointer, filed-cs - See order dated 4/12/84.
Apr. 12, 1984	Order in this and related cases that these cases are consolidated with 83-P-3010-S for pretrial purposes; plaintiffs' motion of 4/5/84 is granted to the extent that the order dated 4/2/84 is amended so reference to CV 83-AR-2166-S reads CV 83-AR-2116-S; in all other respects said motion is denied; a master file for these consolidated cases is established under the caption "In re: Birmingham Reverse Discrimination Employment Litigation," CV 84-P-0903-S; a pretrial conference will be held at 9 a.m., 5/14/84; Raymond Fitzpatrick to act as lead counsel for plaintiffs' and James Alexander to act as lead counsel for defendants, filed (POINTER); entered 4/12/84-cm-slm.
Jan. 14, 1985	Motion of USA to realign as party plaintiff, filed-cs-slm (del to SCP). See Order dated 2/18/85 in CV 84-P-0903-S.
Jan. 14, 1985	Complaint in intervention of USA filed in this and 83-P-2116-S, filed-cs-slm.
Feb. 26, 1985	Answer of Jefferson County Personnel Board to complaint of James A. Bennett, filed-cs-slm.
Feb. 26, 1985	Answer of Jefferson County Personnel Board to complaint in intervention of USA, filed-cs-slm.
Mar. 11, 1985	Answer and Counterclaims of Martin, et al, defendant-intervenors to USA's complaint in the intervention filed-cs-slm (filed in this and 84-0903-S).
Mar. 12, 1985	Answer and Counterclaims of defendants Arrington and City of Birmingham to complaint in intervention of

	USA, filed in this and 84-P-0903-S-cs-slm.
Mar. 22, 1985	Motion of USA in this and 84-0903-S to dismiss the counterclaim of Martin intervenors filed-cs-slm.
Mar. 22, 1985	Motion of USA in this and 84-0903-S to dismiss the counterclaim of defendants Arrington and City of Birmingham, filed-cs-slm.

Birmingham Association of City Employees, et al., v. Arrington, et al., CV 82-P-1852-S

Aug. 30, 1982	Complaint filed-snh.
Aug. 30, 1982	Motion (application) of plaintiff for temporary restraining order filed-snh.
Sept. 1, 1982	Motion of defendant, Personnel Board of Jefferson County, to dismiss the complaint filed-cs-snh- DENIED. See bench notes 9/2/82-1pc.
Sept. 1, 1982	Answer of defendant, Personnel Board of Jefferson County, to the complaint filed-cs-snh.
Sept. 1, 1982	Motion of John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas, and Charles Howard, to intervene in this action as parties defendant, filed-cs-snh - GRANTED. See bench notes 9/2/82-1pc.
Sept. 2, 1982	On hearing before the Hon. Sam C. Pointer, Jr. on application of the plaintiffs for a temporary restraining order - motion of defendant Personnel Board to dismiss previously filed - DENIED - motion of Martin intervenors previously filed - GRANTED - testimony of plaintiffs - plaintiffs rest - arguments by counsel - findings of fact and conclusions of law dictated into the record by the court denying the application of

	plaintiffs for a temporary restraining order - Rptr: Brenda Evans - 1pc.
Sept. 2, 1982	Answer of defendant-intervenors John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard, to the complaint, filed-cs-1pc.
Sept. 2, 1982	Clerk's Court Minutes that pursuant to the findings of fact and conclusions of law dictated into the record by the Court, that the application of the plaintiffs for a temporary restraining order is DENIED, filed; entered 09/02/82-cm-snh.
Sept. 2, 1982	Affidavit of John Duncan filed-snh.
Sept. 21, 1982	Motion of defendants, Richard Arrington, Jr. and City of Birmingham, to dismiss or in the alternative for summary judgment filed-cs-snh. 5/14/84 OVERRULED (POINTER); entered 5/14/84-cm-slm.
Oct. 7, 1982	Summons and complaint and clerk's court minutes returned executed 09/10/82 on Jefferson County Personnel Board, Director Curtin; Members of the Personnel Board; Joseph Curtin; Hiram Y. McKinney; City of Birmingham; Henry P. Johnston Richard Arrington, Jr. and UNEXECUTED on James B. Johnson, filed-snh.
Oct. 7, 1982	Transcript of proceedings had before the Honorable Sam C. Pointer, Jr. on September 2, 1982 in Birmingham, Alabama, with exhibits attached, filed-snh (Brenda Evans, Court Reporter).
Oct. 12, 1982	Summons, complaint and clerk's court minutes returned executed 09/14/82 on USA; 09/17/82 on Atty. Gen., filed-snh.
Oct. 13, 1982	Motion of defendant, USA, to dismiss or in the alternative for summary judgment with exhibits attached, filed-cs-snh (del to SCP for 10/22/82- m.d.) 5/14/84 GRANTED AS AMENDED (POINTER); entered 5/14/84-cm-slm.

Oct. 26, 1982	Motion of defendant-intervenors, John W. Martin, et al, to dismiss and for allowance of costs, filed-cs-snh — 5/14/84 OVERRULED (POINTER); entered 5/14/84-cm-slm.
Dec. 3, 1982	Answer of defendant-intervenors John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard to the complaint, filed-cs-snh.
Mar. 2, 1983	Motion of plaintiffs to amend the complaint, filed-cs-slm — 4/22/83 GRANTED (POINTER); entered 4/25/83-cm-slm.
Aug. 4, 1983	Motion of plaintiffs to consolidate this and CV 74P-12-S, CV 74-P-17-S and CV 75P-666-S, filed-cs-slm.
Mar. 19, 1984	Motion of defendant-intervenors, Martin, Florence, McGruder, Coar, Thomas, Thomas and Howard, in this and CV 83-AR-2116-S, CV 83-AR-2680-S, CV 82-P-0850-S, CV 82-P-01461-S, for consolidation, filed-cs-snh. See order dated 4/2/84.
Mar. 26, 1984	Response of plaintiffs in this and related cases to defendant-intervenors motion for consolidation.
Mar. 27, 1984	Motion of defendant intervenor Wanda Thomas in this and related cases to withdraw from participation in these actions, filed-cs-slm (del to SCP) — 4/4/84 GRANTED (POINTER); entered 4/4/84-cm-slm.
Mar. 30, 1984	Motion of defendant USA to amend motion to dismiss and to withdraw motion for summary judgment, filed-cs-slm

	(del to SCP). 5/14/84 GRANTED (POINTER); entered 5/14/84-cm-slm.
Mar. 30, 1984	Answer of defendant USA to the complaint, filed-cs-slm.
April 2, 1984	Order in this and 82-P-850-S and 82-P-1461-S that these three cases are consolidated with 83-AR-2116-S and 83-AR-2680-S for pretrial purposes, subject to further court order; two cases currently pending before Judge Acker are reassigned to Judge Pointer, filed (POINTER); entered 4/2/84-cm-slm.
April 2, 1984	Motion of plaintiffs in this and related cases for clarification and reconsideration of 3/20/84 order of Judge Acker and 3/30/84 order of Judge Pointer, filed-cs-slm. See order dated 4/12/84.
April 12, 1984	Order in this and related cases that these cases are consolidated with 83-P-3010-S pretrial purposes; plaintiffs' motion of 4/5/84 is granted to the extent that that order dated 4/2/84 is amended so reference to CV 83-AR-2166-S reads CV 83-AR-2116-S; in all other respects said motion is denied; a master file for these consolidated cases is established under the caption "In re: Birmingham Reverse Discrimination Employment Litigation," CV 84-P-0903-S; a pretrial conference will be held at 9 a.m., 5/14/84; Raymond Fitzpatrick to act as lead counsel for plaintiffs and James Alexander to act as lead counsel for defendants, filed (POINTER); entered 4/12/84-cm-.
April 18, 1984	Opposition of defendant-intervenors to USA's motion for leave to amend the motion to dismiss and to withdraw motion for summary judgment, filed-cs-snh in this and 84-0903-S.

May 17, 1985	Motion of USA to realign as party plaintiff, with proposed complaint in intervention attack filed-cs-slm. See order dated 7/8/85.
July 8, 1985	Answer of defendants Arrington and City of Birmingham to USA's complaint in intervention with counterclaim thereon, filed-cs-slm.
July 15, 1985	Counterclaim (Amendment) of defendants Arrington and City of Birmingham in this and 84-0903-S to complaint in intervention of USA, filed-cs-slm.
July 17, 1985	Answer of defendant intervenors Martin, et al to complaint in intervention of USA, with counterclaim thereon, filed-cs-slm.
July 18, 1985	Motion of USA in this and 84-0903-S to dismiss the counterclaim of Arrington and City of Birmingham, filed-cs-slm.
July 26, 1985	Motion of USA in this and 84-0903-S to dismiss amendment to counterclaim of Arrington and City of Birmingham, filed-cs-slm.
July 26, 1985	Motion of USA in this and 84-0903-S to dismiss counterclaim of Martin, et al intervenors, filed-cs-slm.

Wilks, et al. v. Arrington, et al., CV 83-AR-2116-S

Sept. 7, 1983	Complaint, filed-tyt. Summon and complaint issued - del. to plaintiff-tyt.
Sept. 15, 1983	Amendment to the complaint, filed-cs-snh. Summons, complaint and amendment issued - del to plaintiff for service on James B. Johnson-snh.
Sept. 28, 1983	Motion of defendants Arrington and City of Birmingham to reassign this case to the Hon. Sam C. Pointer, Jr., filed-cs-tyt. (Del. WMA) See 9/30/83 Order.

Sept. 28, 1983	Answer of defendants Richard Arrington, Jr., and City of Birmingham to complaint, filed-cs-tyt.
Sept. 30, 1983	Order that motion to reassign is DENIED, filed (ACKER) entered 9/30/83-cm-tyt.
Oct. 18, 1983	Answer of defendant, Hiram Y. McKinney, James B. Johnson and Roderick Beddow, Jr., and the Personnel Board of Jefferson County, to the complaint, filed-cs-lpc.
Oct. 27, 1983	Motion of defendants Richard Arrington, Jr. and City of Birmingham to consolidate with CV 75-P-0666, filed-cs-tyt. (Del. WMA) See 12/13/83 Order.
Oct. 31, 1983	Opposition of plaintiffs to motion to consolidate, filed-cs-tyt (Del. WMA).
Dec. 13, 1983	Order that defendants motion to consolidate is DENIED, filed (ACKER) entered 12/13/83-cm-tyt.
Feb. 9, 1984	Motion of John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard to intervene as parties defendant, filed-cs-tyt - See Order of 3/5/84.
Feb. 24, 1984	Motion of John E. Garvich, Jr., James W. Henson and Robert Bruce Millsap to intervene as parties plaintiff, filed-cs-tyt (Del. WMA) See 3/5/84 Order.
Feb. 24, 1984	Opposition of plaintiffs to motion to intervene as parties defendant of Martin, et al. filed-cs-tyt (Del. WMA).
Feb. 24, 1984	Opposition (second) of plaintiffs to motion to intervene as parties defendant Martin, et al, filed-cs-tyt (Del. WMA).
Feb. 28, 1984	Hearing (with CV 83-AR-2680-S) on motions, combined with status conference, before the Hon. William M.

	Acker, Jr. - Oral motion of USA to intervene as party plaintiff - taken under advisement, written ruling to be entered - Charles Cooper, Deputy Attorney General and William Worthen and Richard Ritter, Attorneys, Civil Rights Division of Dept. of Justice, admitted pro hac vice upon oral motion of U.S. Atty; written formal order to be entered; written rulings on pending matters to be entered by the Court - RPTR: Lee Cook -rfd.
March 5, 1984	Memorandum opinion and order that the Court allows intervention of the United States and is required to file a complaint-in-intervention on or before 6/15/84; the Court will allow intervention by Martin, Florence, McGruder, Coal, Thomas, Thomas and Charles Howard as individuals but not as representatives of a class unless and until they meet the requirements of Rule 23, FRCP in *this* case; petition of Garvich, Henson and Millsap to intervene as parties plaintiff is due to be granted and shall be designated simply as "plaintiffs" rather than intervenors and all further pleadings shall treat Garvich, et al., as if they had been original plaintiffs; pretrial conference is CONTINUED and re-set on 6/1/84 at 1:30 p.m.; all discovery shall be completed on or before 6/15/84, filed (ACKER) entered 3/6/84-cm-tyt.
March 6, 1984	Complaint in intervention of John E. Garvich, Jr., James W. Henson and Robert Bruce Millsap, filed-cs-tyt.
March 6, 1984	Answer of defendant-intervenors, John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard to complaint, filed - no cs-tyt.
March 6, 1984	Motion of defendants Arrington and City of Birmingham to condition inter-

	vention upon compliance with FRCP Rule 24(c), filed-cs-tyt (Del. WMA) See 3/8/84 Order.
March 8, 1984	Order dated 3/6/84 that motion of defendants to condition intervention is DENIED without prejudice to its being refiled on or after 6/15/84, filed (ACKER) entered 3/8/84-cm-tyt.
March 19, 1984	Motion of defendant-intervenors, John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard, in this and CV 83-AR-2680-S, CV 82-P-0850-S, CV 82-P-1461-S and CV 82-P-1852-S, to consolidate, filed-cs-sr. — See Order 3/20/84.
March 20, 1984	Affidavit of O. Neal Gallant, filed-cs-tyt (del WMA).
March 20, 1984	Order that the motion to consolidate is DENIED; there is, however, no intention to rule on any motion pending in a case not assigned to the undersigned, filed (ACKER) entered 3/20/84-cm-lpc.
March 21, 1984	Motion of defendant-intervenors Martin, Florence, McGruder, Coar, W. Thomas, E. Thomas and C. Martin to dismiss U.S. as intervenor in this and CV 83-AR-2680 filed-cs-tyt (Del. WMA) DENIED 3/23/84 (ACKER) entered 3/26/84-cm-tyt.
March 27, 1984	Answer of plaintiffs opposing defendant-intervenors' motion to consolidate, filed-cs-tyt.
March 27, 1984	Answer of defendants Arrington and City of Birmingham to complaint in intervention, filed-cs-tyt.
March 29, 1984	Answer (Amended) of defendant-intervenors to the complaint, filed-cs-slm.

April 5, 1984	Motion of plaintiffs in this and related cases for clarification and reconsideration of 3/20/84 order of Judge Acker and 3/30/84 order of Judge Pointer, filed-cs-slm - See order dated 4/12/84.
April 6, 1984	Answer of defendant-intervenors to complaint in intervention of John E. Garvich, Jr., James W. Henson and Robert Bruce Milsap, filed-cs-slm.
April 10, 1984	Transcript of proceedings had before Hon. William A. Acker, Jr., on 2/28/84 in Birmingham, Alabama, filed in this and CV 83-P-2680-S (orig. placed in this file).
April 12, 1984	Order in this and related cases that these cases are consolidated with 83-P-3010 - pretrial purposes; plaintiffs' motion of 4/5/84 is granted to the extent that the order dated 4/2/84 is amended so reference to CV 83-AR-2166-S reads CV 83-AR-2116-S; in all other respects said motion is denied; a master file for these consolidated cases is established under the caption "In re: Birmingham Reverse Discrimination Employment Litigation," CV 84-P-0903-S; a pretrial conference will be held at 5/14/84; Raymond Fitzpatrick to act as lead counsel for plaintiffs and James Alexander to act as lead counsel for defendants, filed (POINTER); entered 4/12/84-cm-slm.
Jan. 14, 1985	Complaint in intervention of USA filed in this and 82-P-0850-S-cs-slm (del to SCP).
Feb. 12, 1985	Answer in this and 84-P-0903-S of defendants Arrington and City of Birmingham to the complaint in intervention of USA, with counterclaim thereon, filed-cs-slm.

Feb. 14, 1985	Answer of Martin intervenors to complaint in intervention of USA, with counterclaim thereon, filed-cs-slm.
Feb. 26, 1985	Answer of defendant Jeffco Personnel Board to complaint in intervention of USA, filed-cs-slm.
Feb. 26, 1985	Answer of defendant Jeffco Personnel Board to amended complaint in intervention of Howard Pope, filed-cs-slm.
Feb. 26, 1985	Answer of Jeffco Personnel Board to complaint in intervention of John E. Garvich, filed-cs-slm.
March 12, 1985	Motion of defendants Arrington and City of Birmingham to amend their answer to USA's complaint in intervention, filed in this and 84-0903-S-cs-slm.
April 15, 1985	Motion of United States in this and 84-P-0903-S to dismiss the counterclaims of Martin et al defendant-intervenors, filed-cs-slm.
Aug. 23, 1985	Answer of defendant Jeffco Personnel Board in this and 84-0903-S to complaint in intervention of Charles Carlin, filed-cs-slm.
Aug. 29, 1985	Answer of defendants Arrington and City of Birmingham in this and 84-0903-S to complaint in intervention of Charles Carlin, filed-cs-slm.
Sept. 3, 1985	Answer in this and 84-0903-S of Martin defendant-intervenors, to complaint in intervention of Charles Carlin, filed-cs-slm.

In Re: Birmingham Reverse Discrimination Employment Litigation, CV 84-P-903-S

April 12, 1984	Order that plaintiffs' motion in CV 82-P-0850-S, CV 82-P-1852-S, CV 83-P-2116-S and CV 83-2680-S of 4/5/84 is granted to the extent that the order of

	4/2/84 is amended so that the reference to CV 83-AR-2166-S reads CV 83-AR-2116-S; in all other respects said motion is denied; pursuant to FRCP 42, CV 83-P-3010-S is consolidated for pretrial purposes with CV 82-P-0850-S, CV 82-P-1461-S, CV 82-F-1852-S, CV 83-P-2116-S and CV 83-P-2680-S; a master file for these consolidated cases is established under the caption "In Re: Birmingham Reverse Discrimination Employment Litigation," CV 84-P-0903-S; a pretrial conference will be held at 9 a.m., 5/14/84; Raymond Fitzpatrick to act as lead counsel for plaintiffs, James Alexander to act as lead counsel for defendants, filed (POINTER); entered 4/12/84-cm-slm.
April 13, 1984	Answer of defendants, Richard Arrington, Jr. and the City of Birmingham, to the amended complaint (CV 83-P-2680-S) filed-cs-snh.
April 16, 1984	Motion of Defendant-Intervenors John W. Martin, et al, in this and related cases, to dismiss the complaints, with exhibits attached, filed-cs-sjl - 5/14/84 OVERRULED (POINTER); entered 5/14/84-cm-slm.
April 18, 1984	Opposition of defendant-intervenors to USA's motion for leave to amend motion to dismiss and to withdraw motion for summary judgment filed-cs-snh.
April 25, 1984	Motion of defendants Arrington and City of Birmingham to dismiss complaints in 82-850-S, 82-146-S, 83-2116-S and 83-2680-S, filed-cs-slm.
May 4, 1984	Opposition of plaintiffs to defendant-intervenors motion to dismiss the complaints, filed-cs.
May 22, 1984	Transcript of proceedings had before the Hon. Sam C. Pointer, Jr. on 5/14/84, in Birmingham, Alabama,

	filed-slm (Mayra Malone - Court Reporter).
July 13, 1984	Motion of Michael W. Martin and Howard E. Pope to intervene, with proposed complaint in intervention attached, filed-cs-slm (del to SCP) 7/23/84 GRANTED as to Howard Pope; otherwise DENIED (POINTER); entered 7/23/84.
July 17, 1984	Motion (amendment-voluntary dismissal) of proposed plaintiff-intervenor Michael W. Martin to withdraw his motion to intervene, filed-cs-slm (del to SCP).
Aug. 1, 1984	Complaint in Intervention of Howard E. Pope, filed-cs-slm.
Aug. 13, 1984	Answer of defendant Arrington and City of Birmingham to amended complaint in intervention of Howard E. Pope, filed-cs-slm.
Aug. 13, 1984	Answer of defendant-intervenors Martin, et al to amended complaint in intervention of Howard E. Pope, filed-cs-slm.
Oct. 23, 1984	Motion of plaintiffs James A. Bennett, Gerald L. Johnson, Philip H. Whitley, David H. Woodall, Danny R. Laughlin, Marshall H. Whitson and Dudley L. Greenway to dismiss their individual claims, filed-cs-slm (del to SCP). 12/14/84 GRANTED (POINTER); entered 12/14/87-cm-slm.
Dec. 21, 1984	Motion of defendants Arrington and City of Birmingham for partial summary judgment, with affidavits of W. Gordon Graham, John L. Duncan, O. Neal Gallant and Arthur V. Deutcsh and exhibits attached, filed-cs-slm. See order dated 2/18/85.

Jan. 2, 1985	Motion of defendant-intervenors Martin, et al for partial summary judgment, filed-cs-slm. See order dated 2/18/85.
Jan. 14, 1985	Complaint in intervention of USA filed in this and 83-P-2116-S and 82-850-S, filed-cs-slm. (del to SCP).
Jan. 14, 1985	Motion of USA to realign as party plaintiff filed in this and 82-P-0850-S, filed-cs-slm. See order dated 2/18/85.
Jan. 22, 1985	Motion of USA to strike certain affidavits or portions thereof, filed-cs-slm. See order dated 2/18/85.
Jan. 22, 1985	Response of plaintiff Wm. Garner to defendant intervenors and defendant Arrington for partial summary judgment, filed-cs-slm.
Jan. 22, 1985	Response of USA in opposition to defendant intervenors, defendants Arrington and City of Birmingham for partial summary judgment, filed-cs-slm.
Jan. 22, 1985	Opposition of plaintiffs to motions for partial summary judgment with exhibits attached-filed-cs-slm.
Feb. 5, 1985	Affidavit (supplemental) of W. Gordon Graham with exhibits attached, filed-cs-slm.
Feb. 12, 1985	Answer of defendants Arrington and City of Birmingham in this and 83-P-2116-S to USA's complaint in intervention, with counterclaim thereon, filed-cs-slm.
Feb. 12, 1985	Answer of Martin intervenors to complaint in intervention of USA, with counterclaim thereon, filed-cs-slm (placed in 83-P-2116-S).
Feb. 15, 1985	Opposition (supplemental) of plaintiffs to motions for partial summary judgment, filed-cs-slm.

Feb. 19, 1985	Memorandum of Opinion, dated 2/18/85, filed (POINTER); entered 2/19/85-cm-slm.
Feb. 19, 1985	Order dated 2/18/85 in accordance with Memorandum of Opinion entered contemporaneously that motions for partial summary judgment of defendants are denied; pursuant to FRCP 42(b), issues regarding the effect and validity of Personnel Board tests are severed for subsequent trial after resolution of the other issues in this case; all discovery pertaining to effect and validity of Personnel Board tests is deferred until completion of the initial trial; USA's motion to strike affidavits or portions thereof is denied; USA's motion to realign as party plaintiff in 82-P-850-S is granted, subject to limitations in accompanying Memo of Opinion, filed (POINTER); entered 2/19/85-cm-slm.
Feb. 19, 1985	Motion of USA to strike portions of supplemental affidavit of W. Gordon Graham, filed-cs-slm (del to SCP)—See order dated 3/7/85.
Feb. 20, 1985	Motion of David L. Hamilton, Randy E. Woods, Stanley D. Rogers, James R. Pharris, William V. Sulser, Jr., Ronald Vaughn, Rex Earl Keeling, Mike C. Thomas, Kenneth W. Smith, John E. Courington and Barry Dale Bartlett to intervene as party plaintiffs in this cause, with proposed complaint in intervention and exhibits attached, filed-cs-slm (del to SCP). See order dated 3/7/85.
Feb. 26, 1985	Answer of Jefferson County Personnel Board to complaint of James A. Bennett, filed-cs-slm.
Feb. 26, 1985	Answer of Jefferson County Personnel Board to amended complaint in intervention of Howard E. Pope, filed-cs-slm.

Feb. 26, 1985	Answer of Jefferson County Personnel Board to amended complaint of Victor Zannis, filed-cs-slm.
Feb. 26, 1985	Answer of Jefferson County Personnel Board to complaint in intervention of USA, filed-cs-slm.
Mar. 5, 1985	Motion of Raymond V. Martin to intervene as additional party plaintiff, filed-cs-slm — See order dated 4/17/85.
Mar. 7, 1985	Order that motion of United States to strike portions of supplemental affidavit of W. Gordon Graham is denied; motion to intervene as parties plaintiff on behalf of D. Hamilton, R. Woods, S. Rogers, J. Pharris, W. Sulser, R. Vaughn, R. Keeling is granted and these parties are given leave to intervene in CV 82-P-1461-S; time within which defendants must respond to claims of these intervening plaintiffs is suspended until 20 days after completion of the first trial in this case, or until otherwise ordered by the Court, filed (POINTER); entered 3/8/85-cm-slm.
Mar. 11, 1985	Answer and Counterclaim of Martin, et al, defendant intervenors to USA's complaint in intervention, filed-cs-slm.
Mar. 12, 1985	Answer and Counterclaim of defendants Arrington and City of Birmingham to complaint in intervention of USA, filed in this and 82-P-0850-S-cs-slm.
Mar. 12, 1985	Motion of defendants Arrington and City of Birmingham to amend their answer to USA's complaint in intervention in 83-2116-S, with proposed amendment attached, filed-cs-slm — See order dated 4/17/85.
April 12, 1985	Motion of Donald Vaughn to intervene, with complaint in intervention thereon,

	filed-cs-slm (del to SCP) — See order dated 4/17/85.
April 15, 1985	Motion of United States in this and 83-P-2116-S to dismiss the counterclaim of Martin; et al defendant-intervenors, filed-cs-slm (del to SCP).
April 15, 1985	Motion of United States in this and 83-P-2116-S to dismiss the counterclaims of defendants Arrington and City of Birmingham, filed-cs-slm (del to SCP).
April 18, 1985	Order dated 4/17/85 that the motion to admit Frederick Linton Medlin pro hac vic is granted; motion to intervene on behalf of Raymond V. Martin in 83-2680-S is granted, but the time within which the defendants must file an answers or responsive pleadings is suspended until 20 days following completion of the first trial in case; motion to intervene on behalf of Donald Vaughn in 82-1461-S is granted, but the time within which the defendants must file an answer or responsive pleading suspended until 20 days following completion of the first trial in this case; motion to amend filed on behalf of defendants Arrington and City of Birmingham in 83-2116-S is granted, filed (POINTER); entered 4/18/cm-slm.
April 18, 1985	Answer (Amended) of defendants Arrington and City of Birmingham to complaint in intervention of USA, with counterclaim thereon, filed in this and 83-2116-S, cx-slm.
April 22, 1985	Motion of USA in this and 82-0850-S to dismiss counterclaim of Martin intervenors-filed-cs-slm.
April 22, 1985	Motion of USA in this and 82-0850-S to dismiss counterclaim of defendants Arrington and City of Birmingham—filed-cs-slm.

May 3, 1985	Motion of Personnel Board of Jefferson County to amend answers in 83-2116-S, intervention of Pope in 83-2116-S, intervention of Garvick in 83-2116-S, intervention of USA in 83-2116-S and 82-850-S, 82-850-S, 82-1852, 83-2680-S, filed-cs-slm (del to SCP)—See order dated 7/8/85.
May 17, 1985	Motion of USA in this and 82-1852-S to realign as party plaintiff, with proposed complaint in intervention attached, filed-cs-slm—See order dated 7/8/85.
May 17, 1985	Complaint in Intervention of USA in this and 83-2680-S, filed-cs-slm.
June 3, 1985	Response of USA to defendant intervenors' first request for admissions re: history of race discrimination, filed-cs-slm.
July 8, 1985	Order that the United States' motion to realign in 82-1852-S is granted to the extent that the United States in good faith believes that actions of City are discriminatory against plaintiffs and neither required nor permitted by the consent decree; time within which defendants must answer complaint in intervention of U.S. in 83-2680-S is postponed until 20 days following completion of first trial in this case or such time as otherwise ordered by the Court; City's motion to quash subpoenas duces tecum directed to Chiefs Gallant and Laughlin is moot; City's motion for protective order is granted, subject to City's indication during the conference that it is willing to produce a summary describing the general policies and procedures for promotion within Police and Engineering Depts. upon request; Personnel Board's motion to amend its answers is granted; U.S.'s motion to quash subpoena duces tecum directed to Richard Ritter is granted insofar as Mr. Ritter need not produce documents

listed in Ex. A to U.S.'s response to Martin intervenors Rule 34 requests; otherwise the motion is denied; U.S.'s motion under Rule 26 to declare that its deposition not be had is granted; Martin Intervenors' motion under Rule 37 to compel production is denied as set out; Martin intervenors motion under Rule 37 to compel further interrogatory answers from plaintiffs or to limit evidence is denied, subject to plaintiffs' disclosure by 9/1/85 of witnesses and documents they anticipate using at trial, to be followed by similar disclosure from defendants by 9/25/85; discovery cutoff date of 10/1/85 is established in this case, filed (POINTER); entered 7/8/85-cm-slm.

July 8, 1985 — Answer of defendants Arrington and City of Birmingham to USA's complaint in intervention with counterclaim thereon, filed in this and 82-P-1852-S-cs-slm.

July 11, 1985 — Transcript of proceedings had before Hon. Sam C. Pointer, Jr. on 7/3/85 in Birmingham, Alabama, filed-slm (Laura Nichols - Ct. Rptr.).

July 12, 1985 — Motion of Charles E. Carlin to intervene in Wilks v. Arrington, with complaint in intervention thereon, filed-cs-slm—See order dated 8/9/85.

July 12, 1985 — Order that paragraph 10 of 7/8/85 order is amended to reflect that the discovery cutoff in this case is 10/31/85, as orally ruled by the court during the status conference on 7/3/85, filed (POINTER); entered 7/15/85-cm-slm.

July 15, 1985 — Counterclaims (Amendment) of defendants Arrington and City of Birmingham in this and 82-1852-S to complaint in intervention of USA, filed-cs-slm.

July 17, 1985 — Answer of defendant intervenors Martin, et al to complaint in intervention of USA, with Counterclaim thereon, filed-cs-slm in this and 82-1852-S.

July 18, 1985 — Motion of USA to dismiss counterclaim of Arrington and City of Birmingham, filed-cs-slm.

July 26, 1985 — Motion of USA to dismiss amendment to counterclaims of defendants Arrington and City of Birmingham, filed in this and 82-1852-S-cs-slm.

Aug. 12, 1985 — Order dated 8/9/85 that Charles Carlin's motion to intervene in 83-2116-S is granted as the *Wilks* will be involved in 1st trial; defendant to answer complaint in intervention within time required by law; filed (POINTER); entered 8/12/85-cm-slm.

Aug. 29, 1985 — Answer of defendants Arrington and City of Birmingham to complaint in intervention of Charles Carlin, filed in this and 83-2116-S—cs-slm.

Sept. 3, 1985 — Answer of defendant intervenors Martin, et al to complaint in intervention of Carlin, filed.

Sept. 12, 1985 — Witness and exhibit lists of USA, filed-cs-slm.

Sept. 16, 1985 — Motion of USA for pre-trial evidentiary ruling on burdens of proof at trial, filed-cs on brief-slm (del to SCP) - See order dated 9/2/85.

Sept. 19, 1985 — Witness and exhibit list of plaintiffs, filed-cs-slm.

Sept. 24, 1985 — Transcript of proceedings held on 9/17/85 before Hon. Sam C. Pointer, Jr.

Sept. 26, 1985 — Order dated 9/25/85 that the motion by USA to compel production of documents by City of Birmingham and Arrington is granted; motion of USA to

compel defendant-intervenors to provide responses to certain interrogatories is denied in part and granted in part as set out; motion of USA to compel defendant intervenors to produce documents is granted in part and denied in part as set out; motion of defendant-intervenors to have certain requests for admissions deemed admitted for judicial notice of certain fact and denied request to be treated as interrogatories is denied; joint motion of defendant-intervenors, City of Birmingham and Arrington to compel compliance with pretrial order entered on 7/8/85 is granted as set out; City of Birmingham to permit deposing of Fire Lieutenants Eugene Baldwin, Albert Isaac, Clavin Echols, Jackie Barton and Benjamin Garrett; for present purposes of preparing for trial, plaintiffs and USA to assume that they carry the burden of proof, filed (POINTER); entered 9/26/85-cm-slm.

Oct. 25, 1985 — Motion of USA to set for hearing on 11/15/85 USA's motion for pretrial evidentiary ruling, filed-cs-slm (del to SCP) - See order dated 11/8/85.

Nov. 4, 1985 — Transcript of proceedings had before Hon. Sam C. Pointer, Jr., on 10/31/85 in Birmingham, Alabama filed-slm (Rptr. - Michael Lowery/Tyler Tribble Eaton & Morgan.

Nov. 12, 1985 — Order dated 11/8/85 that the joint motion of City of Birmingham, Arrington and defendant-intervenors to enlarge time for discovery is partially granted; time permitted for discovery for all parties is enlarged from 11/7/85 to 11/21/85; two motions by City of Birmingham and Arrington to compel further responses from USA and plaintiffs to second interrogatories is partially granted; USA and plaintiffs to answer

by 11/21/85 those questions put forth by the City of Birmingham and Arrington that pertain to individuals who are allegedly unqualified, or demonstrably better or less qualified; motion USA and plaintiffs for scheduling order is granted; motion by USA for sanctions against defendant intervenors is denied: motion by USA requesting a hearing on pretrial evidentiary ruling is denied, filed (POINTER); entered 11/12/85-cm-slm.

Nov. 14, 1985 — Order on 11/12/85 motion of plaintiffs that defendants Arrington and City of Birmingham and defendant intervenors are deemed to have admitted that a significant factor in selection of Lucius Thomas as civil engineer was race; such defendants are also deemed to have qualified this admission by asserting that the City believe it was required by the Decree to take race into consideration; unless withdrawn by 11/21/85, by an amended response to request for admissions, said defendants are also deemed to have admitted that a significant factor in selection of persons as set out was race, filed (POINTER); entered 11/14/85-cm-slm.

Nov. 21, 1985 — Motion of USA and plaintiffs to require defendant intervenors, Arrington and City of Birmingham to submit final witness list, filed-cs-slm (del to SCP) see order dated 12/9/85.

Nov. 21, 1985 — Answers (supplemental) of plaintiffs to City defendants' interrogatories, pursuant to 11/8/85 court order, filed-cs-slm.

Nov. 22, 1985 — Answers (supplemental response) of USA to second interrogatories of Arrington and City, filed-cs-slm.

Nov. 29, 1985 — Motion in limine of defendants Arrington and City of Birmingham and

defendant intervenors to preclude plaintiffs and USA from offering testimony at trial re: post-promotional performance of black City employees whose promotions are challenged in this case, filed-cs-slm - See order dated 12/9/85.

Dec. 3, 1985 — Motion in limine of USA to exclude certain testimony and exhibits listed in defendants joint witness and exhibit list, filed-cs-slm (del to SCP) - See order dated 12/9/85.

Dec. 4, 1985 — Motion (joint) of defendants Arrington and City of Birmingham and defendant intervenors to strike Siskin, Dr. Montgomery Pereira and Martin Shanin from plaintiffs' joint witness list, filed-cs-slm (del to SCP).

Dec. 9, 1985 — Order that pending motions of 11/22/85, 11/21/85, 12/3/85, 11/29/85, 11/25/85, 12/2/85 and 12/4/85 were ruled on at 12/5/85 conference and rulings may be found in transcript of that conference, filed (POINTER); entered 12/9/85-cm-slm.

Dec. 11, 1985 — Transcript of proceedings (status conference) had before Hon. Sam C. Pointer, Jr. on 12/5/85-slm. (Rptr. - Gary Morgan/Tyler Tribble Eaton & Morgan).

Dec. 12, 1985 — Witness list (joint/final) of plaintiffs and USA, filed-cs-slm.

Dec. 12, 1985 — Exhibit list (amended joint) of plaintiffs and USA, filed-cs-slm.

Dec. 16, 1985 — Submission of USA of proposed demonstrative evidence, with exhibits attached, filed-cs-slm.

Dec. 16, 1985 — On trial before the Hon. Sam C. Pointer, Jr. on certain issues - certain stipulations of parties stated into the record - oral motion (renewed) of

United States to shift burden of proof entered - denied- written motion of defendant City of Birmingham to limit admissibility of exhibits #s 6, 7, & 8 filed ruling reserved - depositions of Lucius Thomas, Jr. & Richard E. Goodwin, Jr. taken by the United States filed - testimony of plaintiffs and United States - depositions of George G. Seibels, Jr., Howard Dwight Holsomback & Salley G. Willis taken by defendants filed - daily adj. rptrs. Morgan, Tribble, Nichols and Pritchett (of firm Tyler, Tribble) - 1pc (*excerpts of depositions of H. Dwight Holsomback 11/15/85; Richard Martin 11/16/82; Mayor Arrington 9/16-17/85; James W. Fields 11/18/85; Miriam Hall 1/19/84; O'Neal Gallant 6/18-21/85; John Lawrence Duncan 7/18/85 & 11/15/82; W. Gordon Graham 11/15/82/, 8/20-21/85 & 9/12-13/85; Hobson R. Riley, Jr. 9/18/85; Euel S. Laughlin 7/15-18/85; Ed Lamont 10/24/85).

Dec. 17, 1985 — Trial resumed - testimony of plaintiffs and United States resumed - transcript (2 vols. of proceedings 12/16/85 filed - transcript of morning proceedings of 12/17/85 filed - daily adj. rptrs, Robin, Morgan, Nichols & Pritchett -1pc.

Dec. 18, 1985 — Trial resumed - testimony of plaintiffs and United States resumed - transcript of afternoon proceedings of 12/17/85 filed - deposition of Peter Tyler taken by defendant intervenors filed - oral motion of plaintiffs to allow testimony of Dr. Sisken - granted over objection of defendant-intervenors - oral motion of defendant intervenors to strike certain testimony of Dr. Sisken - overruled - oral motion of defendant-intervenors to strike entire trial - overruled - daily adj. Hearing in chambers - proffer made by plaintiffs re McGuire - ruling

made previously at bench stated into record - two exhibits (417 & 418) received & sealed - rptrs, Morgan, Tribble, Eaton, Nichols & Morgan - 1pc.

Dec. 18, 1985 — Transcript of morning proceedings of 12/18/85 filed-1pc/slm (Vol. V).

Dec. 19, 1985 — Trial resumed - transcript (vol. VI) of afternoon proceedings of 12/18 filed - testimony of plaintiffs & U.S. resumed - proffer of evidence re certain testimony of McKee made in chambers - objection sustained - transcript of proceedings in chambers evening of 12/18/85 filed & sealed per order of SCP - transcript (vol. VII) of proceedings morning of 12/19/85 filed - daily adj. rptrs, Tribble, Morgan, Nichols, Pritchett & Tribble - 1pc.

Dec. 20, 1985 — Trial resumed - testimony of plaintiffs and U.S. resumed - plaintiffs and U.S. rest - depositions (2 vols.) of Cliff Reach taken by defendants filed - transcript (vol. VIII) of proceedings afternoon of Dec. 19, 1985 filed - oral motions of defendants City of Birmingham, et al and defendant intervenors for involuntary dismissal entered denied, subject to reconsideration at conclusion of all evidence - written motion of defendant Personnel Board for Rule 41(b) dismissal filed - granted - deposition of Sarah W. Naugher offered into evidence by defendants & received - defendants rests - proposed findings of fact prepared by defendants filed — rebuttal of plaintiffs in form of documents marked as exhibits & offered into evidence & received - closing arguments by counsel - proposed findings of defendants adopted by the Court subject to revisions and additions as dictated defendants adopted by the Court subject to revisions and additions as dictated

into the record by the Court - written judgment to be entered by the Court, rptrs, Tribble, Nichols, Morgan & Pritchett - 1pc.

Dec. 23, 1985 — Clerk's Court Minutes dated 12/20/85 that pursuant to findings of fact and conclusions of law proposed by defendants Arrington and City of Birmingham and defendant intervenors adopted by the Court and subject to the revisions and additions dictated into the record, a written judgment will be entered by the Court, filed; entered 12/23/85-cm-slm.

Dec. 23, 1985 — Transcript of proceedings had 12/20/85 before Hon. Sam C. Pointer, Jr., filed-slm (vol. IX and X).

Dec. 26, 1985 — Order (and Partial Final Judgment) dated 12/23/85 in accord with findings of fact and conclusions dictated and adopted in open court on 12/20/85, the Court finds for the defendants and against plaintiffs on claims in CV 83-P-2116-S, CV 82-P-0850-S and CV 82-P-1852-S as set out — claims of plaintiff intervenor USA re: Fire & Rescue Service and Engineering Department are dismissed with prejudice — court costs are taxed against private plaintiffs and USA as the Court may subsequently allocate; defendant and defendant intervenors are to file their bill of costs by 1/21/86; all claims for attorneys fees in these cases under 42:1988 and Title VII of Civil Rights Act of 1964, as amended, by defendants and defendant intervenors are denied; this judgment does not affect pending counterclaims against USA in *Wilks*, *Bennett* and *BACE* actions; pursuant to Rule 54(b) FRCP, the Court determines that there is no just reason for delay and expressly directs that judgment be entered with respect to the claims and parties

	described in paragraphs 2-7 of this order, filed (POINTER); entered 12/26/85-cm-slm.
Dec. 26, 1985	Motion of plaintiffs and USA to amend 12/26/85 judgment, filed-cs-slm. See order dated 1/6/86.
Jan. 7, 1986	Order dated 1/6/86 that the Court adopts as additional findings of fact the following numbered paragraphs listed in part I (Adtl Prop. Findings) of said motion: #1, 2, 3, 4, 5, 6, 7, 10, 15, 19, 20, 21 and 22; the Court amends it[s] findings of fact as previously adopted from the proposed findings of fact submitted by defendants to read as set out in this order; in other respects, motion of plaintiffs and USA is denied, filed (POINTER); entered 1/7/86-cm-slm.
Jan. 9, 1986	Motion (joint) of defendants Arrington and City of Birmingham and defendant intervenors to amend 1/7/86 order, filed-cs-slm — See order dated 2/11/86.
Jan. 15, 1986	Answer of defendants Arrington and City of Birmingham to complaint in intervention of Hamilton, Woods, Rogers, Pharris, Sulser, Vaughn, Keeling, Thomas, Smith, Courington and Bartlett filed in 82-P-1461-S, filed-cs-slm.
Jan. 15, 1986	Answer of defendants Arrington and City of Birmingham to complaint in intervention of Raymond Martin filed in 83-P-2680-S, filed-cs-slm.
Jan. 15, 1986	Answer of defendant City of Birmingham to complaint in intervention of Donald Vaughn filed in 82-P-1461-S-cs-slm.
Jan. 15, 1986	Answer of defendants Arrington and City of Birmingham to complaint in intervention of USA filed in 83-2680-S, with Counterclaim thereon, filed-cs-slm.

Jan. 21, 1986	Answer of defendant intervenors to complaint of intervention of Donald Vaughn, filed in this and 82-P-1461-S-cs-slm.
Jan. 21, 1986	Answer of defendant intervenors to complaint in intervention of Hamilton, filed in this and 82-P-1461-S-cs-slm.
Jan. 21, 1986	Answer of defendant intervenors to complaint in intervention of Raymond Martin, filed in this and 83-2680-S-cs-slm.
Jan. 21, 1986	Answer of defendant intervenors to complaint in intervention of USA, with Counterclaim thereon, filed in this and 83-2680-S-cs-slm.
Jan. 27, 1986	Motion of USA in this and 83-2580-S to dismiss counterclaims of Martin defendant intervenors, filed-cs-slm (del to SCP).
Feb. 11, 1986	Order that the motion of defendants and defendant intervenors filed 1/9/86 seeking amendment under Rule 52(b) of the Court's order of 1/7/86 is denied; the motion of plaintiffs and the USA to delay taxation of costs pending appeal is granted; filed (POINTER).
Feb. 11, 1986	Notice of appeal of plaintiffs, Robert K. Wilks, Ronnie J. Chambers, Carlice E. Payne, John E. Garvich, Jr., Robert Bruce Millsap, James W. Henson, Howard E. Pope, Charles E. Carlin, Floyd E. Click, James D. Morgan, Joel Alan Day, Gene E. Northington, Vincent Joseph Vella, Lane L. Denard, Kenneth O. Ware, and Birmingham Association of City Employees, from this court's orders of 12/26/85, 1/7/86, and 2/11/86, filed-cs-sjr.
Feb. 11, 1986	Notice of appeal of plaintiff-intervenor, United States of America, from this court's orders entered 12/26/85, 1/7/86, and 2/11/86, filed-cs-sjr.

Feb. 11, 1986	Motion of USA in this and 83-2680-S to dismiss counterclaims of Arrington and City of Birmingham, filed-cs-smc.
Feb. 18, 1986	Notice of appeal of defendants, Richard Arrington, Jr., and the City of Birmingham from this court's orders entered 12/26/85, 1/7/86, and 2/11/86, filed-cs-sjr.
Feb. 25, 1986	Notice of appeal of defendant-intervenors, Martin, Florence, McGruder, Coar, Thomas, and Howard from this court's order entered 12/26/85, 1/7/86 and 2/11/86, filed-cs-sjr.
Mar. 24, 1986	Motion of Martin defendant intervenors to consolidate or reassign 86-G-0325-S with 74-P-0017-S and 75-P-666-S, or in the alternative, with this action, filed-cs-smc.
Mar. 31, 1986	Motion of City of Birmingham, Arrington and Martin intervenors in this and related cases to compel USA to comply with City Decree etc., filed-cs-smc - See order dated 4/16/86.
April 17, 1986	Order dated 4/16/86 in this and related cases that the joint motion to compel by the City of Birmingham, et al and Martin, et al filed 4/2/86 is deferred and continued pending the resolution of the current cases on appeal, with the exception of the request made in the motion for additional time in which to provide detailed itemization of attorney's fees, which the Court grants; two motion to substitute Judson E. Tomlin, Jr. as counsel for officials of the Jefferson County Personnel Board are granted, filed (POINTER); entered 4/18/86-cm-smc.
June 6, 1986	Motion of Douglas McBee to intervene as party plaintiff, with proposed complaint in intervention (adoption of

	original complaint in Zannis) thereon, filed-cs-smc.
July 5, 1986	Stipulation of the parties to retain the record on appeal, filed-sjr (del SCP).
July 8, 1986	Certificate of readiness of the record on appeal mailed to Clerk-USCA; copy of transmittal letter mailed to attorneys of record-sjr.

In re: Birmingham Reverse Discrimination Employment Litigation (Eleventh Circuit), 86-7108

Sept. 4, 1986	Flg. Order DENYING appellant cross-appellee's motion to defer briefing without prejudice to their filing supplemental briefs after Supreme Court ruling in *Paradise & U.S.* v. *Prescott* and GRANTING an extension of 30 days in which to file their briefs. (FMJ).
Nov. 3, 1986	Flg. Order GRANTING appellee's motion for excess pages not to exceed 60 pages; DENYING motion of the Community Affairs Comm. to participate as Amicus and GRANTING appellees, City of Birmingham, et al an extension of time to file brief for ten days only. (JLE).
Dec. 9, 1986	Flg. Order DENYING appellee's motion for reconsideration as MOOT. JLE.
April 14, 1987	Flg. order that appellees James B. Johnson and the Personnel Board of Jefferson County, Alabama's motion to strike appellants-cross appellees Robert K. Wilks, et al reply brief is CARRIED WITH THE CASE. (GBT).
April 16, 1987	Flg. Order that Appellant-Cross appellee Wilks, et al and appellant U.S.A.'s motions for leave to file supplemental briefs are CARRIED WITH THE CASE. (GBT).

April 17, 1987	Flg. Order that the joint request of Appellee-Cross-Appellants Richard Arrington, Jr., et al. and Intervenors-Appellees-Cross-Appellants Martin, et al for leave to file supplemental briefs is CARRIED WITH THE CASE. (GBT).
Dec. 15, 1987	Flg. Order that appellees James B. Johnson and The Personnel Board of Jefferson County, Alabama's motion to strike appellants-cross-appellees Robert K. Wilks', et al reply brief is DENIED. Appellant'-cross-appellees Wilks', et al motion for leave to file supplemental brief is GRANTED. Appellant United States of America's Motion for leave to file supplemental brief is GRANTED. Appellees-cross-appellants Richard Arrington, Jr.'s et al and intervenors-appellees-cross appellants, Martin's et al joint request for leave to file supplemental briefs is GRANTED. (GBT).
Dec. 15, 1987	AFFIRMED in part, REVERSED in part and REMANDED.
Jan. 27, 1988	Flg. Order that appellee/cross-appellants John W. Martin, et al's motion for leave to supplement Petition for Rehearing & Suggestion of Rehearing In Banc is DENIED. GBT.
Jan. 27, 1988	Flg. Order GRANTING appellants-cross-appellees Robert K. Wilks, et al's motion to retax costs. and DENYING appellees James B. Johnson and The Personnel Board of Jefferson County's motion to join appellees-cross-appellants John W. Martin, et al's Suggestion of Rehearing In Banc. GBT.
Feb. 18, 1988	Flg. defendants-intervenors, appellee's-cross-appellant's motion to substitute counsel. (GRANTED 2/19/88 - 1p).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A BENNETT; FLOYD E. CLICK; JAMES D. MORGAN; JOEL ALAN DAY; GENE E. NORTHINGTON; VINCENT JOSEPH VELLA; and, LANE L. DENARD,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; JAMES B. JOHNSON, HENRY P. JOHNSTON, and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; JOSEPH W. CURTIN, as Director of the Jefferson County Personnel Board; and, JEFFERSON COUNTY PERSONNEL BOARD,

Defendants.

CIVIL ACTION NO.
CV 82-P-0850-S

APPLICATION FOR
TEMPORARY RESTRAINING ORDER

Pursuant to Rule 65(b), Federal Rules of Civil Procedure, the plaintiffs petition the Court to temporarily restrain the above named defendants and their agents, officers, attorneys, employees, successors, and assigns, and all persons acting in concert with them, from enforcing any of the promotional provisions of the consent decrees approved in Case Numbers 75-P-0666-S, 74-Z-17-S and 74-Z-12-S, and from in any way limiting the rights of plaintiffs to be certified for promotion and promoted to classifications within the Birmingham Fire Depart-

ment except strictly in accord with the provisions of Act No. 248 of the Regular Session of the Legislature of Alabama of 1945, as amended to date.

Petitioners have heretofore filed their verified Complaint questioning the validity of the said consent decrees and the application thereof to the plaintiffs. This Petition is filed in order to maintain the status quo until the Court can set down and hear plaintiff's Motion for Preliminary Injunction. Plaintiffs and their attorneys certify that notice, by telephone, has been given to the office of the City Attorney for the City of Birmingham and the regular attorney for the Personnel Board defendants. Plaintiffs further state that the petitioners are in danger of suffering immediate and irreparable injury, loss, or damage if the defendants immediately enforce the promotional and certification provisions of the said consent decrees.

Petitioners further state that the Temporary Restraining Order sought cannot result in any injury to the defendants since the petitioners only seek to maintain the status quo until the hearing on the petitioners' prayer for preliminary injunction can be heard.

In further support hereof, petitioners submit the verified Complaint sworn to by the plaintiffs and offer to post such security as ordered by the Court.

WHEREFORE, petitioners pray for such temporary injunctive relief as prayed for above and such other general relief to which they may be entitled.

/s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.
Attorney for Plaintiffs

Of Counsel:

FOSTER & CONWELL
2015 Second Avenue, North
Birmingham, Alabama 35203
(205) 322-6617

[Certificate of Service, dated April 14, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S

ORDER

The court has considered the plaintiffs' application for a temporary restraining order and the arguments of all counsel related thereto. In the course of the hearing the court made known its view, in its role of supervising implementation of the consent decrees entered in CV 75-P-0666-S, that under § 24 of the consent decree regarding the Personnel Board certification should be made of those entitled to be certified under state law with supplementation of additional qualified persons as needed to enable the City of Birmingham to meet its responsibilities under its Consent Decree rather than to displace any persons from the certification list. Given this interpretation, the city defendants acknowledged that no appointments would be made from the current certification list and the defendant Personnel Board acknowledged that in due course a new certification list would be submitted consistent with this interpretation. These responses by the defendants render any restraining order unnecessary, without regard to the merits of the other issues between the parties. The application for the temporary restraining order is, on this basis, DENIED, without prejudice to the rights of the parties to bring this cause again before the court for hearing at such time as the new certification is made by the Personnel Board.

This the 14th day of April, 1982, at 4:30 p.m.

/s/ Sam C. Pointer, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Rule 65(b), Federal Rules of Civil Procedure, the plaintiffs petition the Court to temporarily restrain the above named defendants and their agents, officers, attorneys, employees, successors, and assigns, and all persons acting in concert with them, from enforcing any of the promotional provisions of the consent decrees approved in Case Numbers 75-P-0666-S, 74-Z-17-S and 74-Z-12-S, from in any way limiting the rights of plaintiffs to be certified for promotion and promoted to classifications within the Birmingham Fire Department except strictly in accord with the provisions of Act No. 248 of the Regular Session of the Legislature of Alabama of 1945, as amended to date, and from making a certification or appointment for promotion on the basis of race pursuant to the Request for Certification attached hereto as Exhibit A.

Petitioners have heretofore filed their verified Complaint questioning the validity of the said consent decrees and the application thereof to the plaintiffs. This Petition is filed in order to maintain the status quo until the Court can set down and hear plaintiff's Motion for Preliminary Injunction. Plaintiffs and their attorneys certify that notice, by telephone, has been given to the office of the attorney for the City of Birmingham and the attorney for the Personnel Board defendants. Plaintiffs further state that the petitioners are in danger of suffering immediate

and irreparable injury, loss, or damage if the defendants immediately enforce the promotional and certification provisions of the said consent decrees.

Petitioners further state that the Temporary Restraining Order sought cannot result in any injury to the defendants since the petitioners only seek to maintain the status quo until the hearing on the petitioners' prayer for preliminary injunction can be heard.

In further support hereof, petitioners submit the verified Complaint sworn to by the plaintiffs, the Affidavit of Billy Gray, and offer to post such security as ordered by the Court.

WHEREFORE, petitioners pray for such temporary injunctive relief as prayed for above and such other general relief to which they may be entitled.

/s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.
Attorney for Plaintiffs

Of Counsel:

FOSTER & CONWELL
2015 Second Avenue, North
Birmingham, Alabama 35203
(205) 322-6617

[Certificate of Service, dated April 19, 1982, and attachments omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham, *et al.*,

Defendants.

CIVIL ACTION NO. CV 82-P-0850-S

AFFIDAVIT OF O. NEAL GALLANT

1. I am the Fire Chief of the City of Birmingham and was appointed to that office in June, 1980.

2. I have been an employee of the Fire Department of the City of Birmingham since 1943 during which time I served as a Firefighter until 1949 when I was promoted to Fire Lieutenant; to Captain in 1952; to Battalion Chief in 1955; and to Assistant Chief in 1961.

3. During my nineteen years as Assistant Chief I was in charge of personnel matters for the Fire Department which charge included the requisitioning of personnel from the Jefferson County Personnel Board to fill existing vacancies in the Department, the interviewing and background checks of persons certified as eligible by the Board, and the selection of that person(s) deemed by me to be best qualified to fill the vacancy, and the submission of same to the Fire Chief for appointment.

4. As Fire Chief I am aware of the provisions of the Consent Decree entered by this Court on August 21, 1981 in Civil Action No. CV-75-P-0666-S as those provisions pertain to the City Fire Department.

5. There are 92 persons presently in the Department occupying the position of Fire Lieutenant, all of whom are white males.

6. During my 39 years' service in the Department there has never been a black person appointed to or holding the position of Fire Lieutenant in the Department.

7. As to Personnel Board certifications of eligibles for, and promotions made by the city to, the position of Fire Lieutenant in the period from August 3, 1981 to the time of the pending certification placed at issue by the plaintiffs in the within case, the Affidavit of Billy Gray herein submitted on plaintiffs' behalf is confusing. The facts are as follows:

a. From an August 3, 1981 certification of 5 eligibles, the city, on August 22, 1981 promoted 3 to Fire Lieutenant, each of whom is a white male. (Exhibit 1 attached)

b. From a November 16, 1981 certification of 4 eligibles the city promoted 2 to Fire Lieutenant, one on November 28 and the other on December 12, 1981, each of whom is a white male. (Exhibit 2 attached)

c. Thus, since the entry on August 21, 1981 of the aforesaid Consent Decree, the city has made 5 promotions to Fire Lieutenant, all of whom are white.

8. On the April 19, 1982 certification of eligibles, at issue herein, I personally interviewed each of the employees thereon listed and have checked their work records and reviewed their personnel files in the Department. There are 5 blacks on the certification, listed thereon as number 9. through 13. I conclude that 4 of the black eligibles, numbers 9., 10., 11., and 13., are competent and qualified to be promoted to and occupy the position of Fire Lieutenant, and that none of the whites on the list are demonstrably better qualified than these 4 blacks. It is my further judgment that the city's promotion of these 4 blacks will in no way lessen the efficiency of the Department nor will their promotions endanger the safety of the public.

The April 19, 1982 certification list is attached as Exhibit 3.

9. In relation to Billy Gray's relative evaluation of the certified blacks and whites as stated in his herein submitted Af-

fidavit, Billy Gray's duties in the Fire Department do not include those of evaluating individuals on certification lists and, in my opinion, he is not qualified to make judgments as to comparative qualifications of eligibles.

/s/ O. Neal Gallant
O. Neal Gallant
Fire Chief, City of Birmingham

Sworn to and subscribed before me,
this 22nd day of April, 1982.

/s/ Notary Public
Notary Public

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham, *et al.*,

Defendants.

CIVIL ACTION NO.
CV 82-P-0850-S

ANSWER OF DEFENDANT-INTERVENORS JOHN W. MARTIN, MAJOR FLORENCE, IDA McGRUDER, SAM COAR, WANDA THOMAS, EUGENE THOMAS AND CHARLES HOWARD

In answer to each numbered paragraph of the complaint, the defendants John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard admit, deny and otherwise respond as follows:

1. Deny

2 through 7. Admit.

8. Defendants are without knowledge or information sufficient to form a belief as to the truth of this averment.

9. Admit that the five persons named are black male firefighter employees of the City of Birmingham who have applied for, and taken the examination for, promotion to the classification of Fire Lieutenant of the Birmingham Fire Department. As to all other averments the defendants are without knowledge or information sufficient to form a belief.

10. Admit the averment of the first sentence of this paragraph, but otherwise deny.

11. Admit the averment of the first sentence of this paragraph, but otherwise deny.

12. Deny.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of this paragraph.

14 through 21. Deny.

22. To the extent this averment is one of fact, deny.

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The plaintiffs lack standing to bring this action.

THIRD AFFIRMATIVE DEFENSE

This Court lacks jurisdiction of the subject matter of this action.

FOURTH AFFIRMATIVE DEFENSE

This action is barred by *res judicata* in that the claim or claims herein asserted were finally adjudicated by judgment of this Court entered in the case of *John W. Martin, et al. v. City of Birmingham, et al.*, Civil Action No. CA 74H17S, on August 18, 1981.

FIFTH AFFIRMATIVE DEFENSE

This action is barred by the laches of the plaintiffs.

WHEREFORE, defendant-intervenors pray that plaintiffs take nothing by their suit, that judgment be entered for the

defendants and that defendant-intervenors be awarded their costs of suit and reasonable attorneys' fees.

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Reeves & Still
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By /s/ Attorneys For Defendants
Attorneys for Defendants

April 22, 1982

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S

MOTION TO INTERVENE AS PARTIES DEFENDANT

John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard move to intervene in this action as a matter of right under Rule 24(a) of the Rules of Civil Procedure and to be permitted to intervene pursuant to Rule 24(b) of the Rules of Civil Procedure upon the following grounds:

1. The complaint in this action alleges that certain provisions of a consent judgment entered by this Court in *John W. Martin, et al. v. City of Birmingham, et al.*, Civil Action No. CA 74H17S, are illegal and void and pray that their enforcement be enjoined.

2. The complaint in this case also alleges that the defendants in the case of *John W. Martin, et al. v. City of Birmingham, et al.* are not properly implementing the consent decree in that case.

3. Movants John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard are plaintiffs in the case of *John v.* [sic] *Martin, et al. v. City of Birmingham, et al.* and are entitled to enjoy the benefits of the consent judgment therein entered.

4. The consent judgment in the case of *John v.* [sic] *Martin, et al. v. City of Birmingham, et al.* is valid on its face and is not subject to collateral attack in another proceeding.

5. The interest of the movants, both on their own behalf and on behalf of others, in the integrity and proper implementation of the consent judgment in the case of *John W. Martin, et al. v. City of Birmingham, et al.* is such that the relief sought in this action, if granted, may as a practical matter impair and impede the ability of the movants to protect that interest. None of the present parties to this action is a beneficiary of the terms of the consent judgment in *John W. Martin, et al. v. City of Birmingham, et al.* and none can adequately represent in this action the interest of the movants.

6. As appears more particularly from the attached Answer, which movants propose be filed if their Motion to Intervene is granted, the movants seek to assert defenses in this action that have common questions of both law and fact with those defenses assertable by the present defendants.

A proposed answer of the movants is attached.

Movants request oral argument on this motion.

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By /s/ Susan W. Reeves

April 22, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., *et al.*,

Defendants.

CIVIL ACTION NO.
CV 82-P-0850-S

NOTICE OF APPEAL

Notice is hereby given that plaintiffs hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the Order denying injunctory relief entered by the District Court on April 23, 1982.

/s/ John S. Foster
JOHN S. FOSTER

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT; FLOYD E. CLICK; JAMES D. MORGAN; JOEL ALAN DAY; GENE E. NORTHINGTON; VINCENT JOSEPH VELLA; AND LANE L. DENARD,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; JAMES B. JOHNSON, HENRY P. JOHNSTON, and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; JOSEPH W. CURTIN, as Director of the Jefferson County Personnel Board; and, JEFFERSON COUNTY PERSONNEL BOARD,

Defendants.

CIVIL ACTION NO.
CV 82-P-0850-S

Before:

Honorable Sam C. Pointer, Jr., Presiding Judge

Birmingham, Alabama - Friday, April 23, 1982, 9:30 a.m.

APPEARANCES:

For the Plaintiffs:

William W. Conwell, Esq.
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PROCEEDINGS

THE COURT: 82-850, Bennett and others versus Arrington and others. This matter is set before the Court at this time on the Plaintiffs' application for a temporary restraining order. There is before the Court a motion by certain individuals to intervene as Parties Defendant. It is my view that that motion is due to be granted under Rule 24-B as it relates to that aspect of the complaint that would seek to invalidate or void portions of the consent decrees. There is another aspect of the complaint really relating to the application and whether there has been some inpermissable [sic] certification of unqualified candidates. As I view it, that is not a matter which the Petitioners for Intervention would have an interest in, none of them, as I believe it to be correct, being involved as fire officers or the like.

MS. REEVES: No, sir. Charles Howard was an applicant with the Fire Department but he failed to pass the fire test and under the provisions the orders were set, if you failed to pass the test, you would not get in. If you couldn't meet the time service requirement to be eligiole for promotion, it would have its residual effect.

MR. FITZPATRICK: Your Honor, may I make one comment?

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Regarding Charles Howard, I do note that the petition is filed by the individuals and not by the classes. Charles Howard was the only one of the seven individuals who related to the Fire Department. In the consent decree, Charles Howard accepted backpay and expressly waived all other relief. That is in Paragraph 33-F of the City Decree.

THE COURT: The ruling of the Court is that under 24-B, these Plaintiffs may be allowed and are allowed to intervene as Parties Defendant for the limited purpose of opposing that portion of the requested relief that would seek to invalidate or void portions of the consent decrees.

Now, first, I would like to inquire whether there is any request by the Plaintiff and whether there is agreement or waiver by the Defendants for the application for a temporary restraining order to be taken as a request for preliminary injunction. Has that matter been considered?

MR. FITZPATRICK: Your Honor, as to the factual issues — as to the legal issues, I have no objection to it being considered an application for preliminary injunction. As to the factual issues, I have had the limited discovery of being able to obtain documents from the Personnel Board. I have not been able to interview —

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I have been expressly told not to interview any of the Personnel Board employees who took part in the compiling of the Personnel Board's documents, so as to the legal issues, it would be our position that a — we have no objection to it being considered an application for preliminary injunction. As to the factual issues, we would prefer that it be considered an application for temporary restraining order, and I believe the Court could sever the two portions of the complaint. Thank you.

MR. ALEXANDER: Your Honor, on behalf of the City, we take the position that the matter ought to be considered simply as an application for a TRO. That — we would also take the further position that it could be done so on the basis of affidavits submitted to the Court and arguments of counsel. We are certainly not in a position to try a preliminary injunction this morning.

THE COURT: All right. Of course, absent consent by the Defendants, the rules of procedure provide for a period of notice and unless that be waived, it can only be heard as an application for TRO. Of course, this will mean, which is the reason in part for my suggestion, that I presumably will need to reset the case for an additional hearing on a preliminary injunction.

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That, however, is the right of the parties to insist upon. All right.

What does the Plaintiff present then on its application for temporary restraining order?

MR. FITZPATRICK: Your Honor, we would first ask the Court to take judicial notice of the prior cases — of the record in 75-P-0666-S, 74-Z-12-S, and I believe the case number in the third case was 74-Z-18-S.

MS. REEVES: 17.

MR. FITZPATRICK: 17-S. Thank you. The consolidated cases which have been styled U.S.A. vs. Jefferson County, et al. We would ask the Court to take judicial notice of that. We didn't see the need for subpoenaing the Clerk of the Court.

THE COURT: The Court will take judicial notice of those.

MR. FITZPATRICK: Thank you, Your Honor. Second, we submit the affidavits of Billy Gray, which was filed with the Court on Monday. We have submitted a second affidavit of Billy Gray, and we submit the affidavits of Mr. Miskelly, Mr. Sorrell, Mr. Wint, Mr. Click, and the verified complaint.

THE COURT: Does the Clerk have those?

THE CLERK: No, sir.

MR. FITZPATRICK: I submitted them to your secretary

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with the brief which she informed me she would deliver to you before you came on the Bench this morning.

THE COURT: I have been involved in another matter this morning.

MR. FITZPATRICK: I am sorry. Yes, sir, we did file a brief and we wanted to make that available to you before you came on the Bench this morning.

THE COURT: I do have Plaintiffs' brief and the affidavits of Click, second affidavit of Gray, Wint, Sorrell, and Miskelly, as well as the original affidavit from Mr. Gray.

MR. FITZPATRICK: And we also submit the verified complaint. We have been unable — we have received documents from the Personnel Board pursuant to a request for production. We would — we have subpoenaed Miriam Hall of the Personnel Board and we would request the opportunity for a short examination.

THE COURT: Relating to the grading or the —

MR. FITZPATRICK: Relating to whether the test has been found to be job-related so as to discuss in the brief — that would then bring in the provisions of Paragraph Two of the City Decree whereby the Plaintiffs have been demonstrated to possess superior qualifications for the Fire Lieutenant job. Again, that was discussed in our brief, and then also relating to the question of

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where the pass point on the exam was set and its impact upon the Plaintiffs.

THE COURT: Well, I take it you are referring to probably no more than five to ten minutes of examination?

MR. FITZPATRICK: I would hope so, yes, sir. Then we do submit our brief which discusses the factual issues and also the legal issues. It brings to the Court's attention authorities which we believe show that collateral attack is proper in this case, and one other case which is not in the brief that I would like to cite to the Court is Jackson vs. Desoto Harris School Board, 585 Fed. 2d 726, 5th Circuit, 1978, where the Court discussed the power of the trial Court to reexamine its prior decision based upon intervening case law, especially when constitutional issues are involved.

I would also like to bring to the Court's attention for the record the portions of the Assistant Attorney General's comments which were taken from the hearings before the House Subcommittee on employment opportunities, to the Committee

of Education and Labor which took place, I believe, on the 23rd of September, 1981. We adopt those comments as argument, and a copy of the comments is attached to the affidavit of Gray. I also have a copy of the transcript in toto if the Court

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wishes to receive it.

THE COURT: I wouldn't think the transcript in total is needed and it is attached.

MR. FITZPATRICK: Yes, sir.

THE COURT: To the affidavit of Mr. Gray.

MR. FITZPATRICK: Your Honor, concerning the fact issues, if I may address them: First of all, the first fact issue which is discussed in my brief —

THE COURT: Let me find out, would that be the basis on what you will be submitting on application for the TRO?

MR. FITZPATRICK: I submit both on the legal issues and on the factual issues, yes, sir.

THE COURT: Let me find out what the Defendants will be submitting on in the way of affidavits or other evidence.

MR. FITZPATRICK: What I have submitted so far plus the testimony. Thank you.

MR. ALEXANDER: Your Honor, for Defendants Arrington and Birmingham, we have filed yesterday the affidavit of Neal Gallant, the City's Fire Chief, describing the selection process. We want to be heard in oral argument in opposition for the TRO.

THE COURT: I have not seen that affidavit and —

MR. ALEXANDER: I want to correct that immediately.

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THE COURT: Has a copy of this been provided to the —

MR. FITZPATRICK: Yes, sir, I just received that.

MR. WHITESIDE: Your Honor, for the Personnel Board, although we maintain that the Fire Lieutenant's Exam is job-related and followed the guidelines, the testing guidelines, we feel that we have not completed our study yet; that we would want to administer the Fire Lieutenant's Examination several times before we present it to the Court. The evidence — the validity we are quite concerned about a premature ruling on evidence, so we would oppose the attempt for that. We do not plan to present any other evidence, unless Ms. Hall is called and then we would like to follow-up with that.

THE COURT: Do the Intervening Defendants plan to present any evidence?

MS. REEVES: No, sir, but we would like to be heard on the oral argument.

THE COURT: All right. The Court will permit limited examination of Ms. Hall with respect to the cutoff score utilized and simply the status of validation. At this point the Court would not anticipate certainly making a ruling on the validity of that test and would certainly not be in a position to do so at this point. You may, however, call Ms. Hall.

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MR. FITZPATRICK: Ms. Hall, please.

MIRIAM HALL,
was sworn and testified as follows:

THE CLERK: State your name for the record.

THE WITNESS: Miriam Hall.

THE CLERK: State where you live.

THE WITNESS: 2713 Wincrest Circle in Gardendale, Alabama.

DIRECT EXAMINATION

BY MR. FITZPATRICK:

Q. Where are you employed, Ms. Hall?

A. Jefferson County Personnel Board.

Q. What is your classification with the Personnel Board?

A. Chief Examiner.

Q. Will you outline your responsibilities?

THE COURT: That is not necessary. Let's just move right on to the heart of the question.

MR. FITZPATRICK: I am trying to ascertain whether she is qualified in the field of psychometrics.

Q. (By Mr. Fitzpatrick) Do you have any certifications or background in the field of psychometrics?

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A. Yes, I do.

Q. Okay. Can you outline them very briefly for the Court?

A. Well, of course, working for the Personnel Board for 13 years, I have had job-related training as well as college course work in statistics.

Q. Are you familiar with the guidelines issued by the Department of Justice and the EEOC regarding the processes by which examinations which the Personnel Board administers may be validated and ascertained to be job-related?

A. Yes.

Q. Pursuant to the subpoena which was issued by the Clerk in this case, there was a request to produce documents. Have you brought the documents with you today?

A. Yes, sir. It was my understanding that you had been provided those documents already.

Q. I have been provided a copy of a portion — of the examiner's manual. Can you identify this (indicating)?

A. Yes. This was the Manual at the stage that our attorney came to the office to pick up some material that we had ready. This is a portion of it. Do you need a —

MR. FITZPATRICK: Will you identify it?

MR. WHITESIDE: This is not the complete copy.

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THE WITNESS: Do you want me to give him a complete copy?

THE CLERK: Plaintiffs' Exhibit Number 1 marked for identification.

(Plaintiffs' Exhibit Number 1 was marked for identification.)

Q. (By Mr. Fitzpatrick) Ms. Hall, can you identify what has been marked as Plaintiffs' Exhibit Number 1?

A. Yes.

Q. And what is it, please, ma'am?

A. The first document is the Personnel Board of Jefferson County Content Validity Study for the Classification of Fire Lieutenant, 1981. The second is the Examiner's Manual, Selection Device Development, Administration and Data Analysis, Fire Lieutenant Classification, 1981.

Q. Thank you. Were these documents prepared under your direction and guidance?

A. Yes, sir, they were.

Q. And under the direction and guidance of Mr. Curtin?

A. Yes.

Q. What do these documents — what is the bottom line intent of these documents?

A. Well, it is documentation of the job-relatedness of the examination.

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Q. And do these relate to the examinations upon which the Personnel Board has on this past Monday certified candidates for the City of Birmingham for the classification of Fire Lieutenant?

A. That is correct.

Q. In this document, is there a conclusion made as to whether or not the examination was job-related?

A. Yes.

Q. What is that conclusion?

A. Well, the conclusion is that the examination is job-related based on the subject matter experts' advice to us in ratings that they did for us in the study.

Q. Who are the experts?

THE COURT: Wouldn't that be included in the study?

MR. FITZPATRICK: Yes, sir.

Q. (By Mr. Fitzpatrick) Was there a conclusion made that the test was highly reliable for both blacks and whites?

A. Yes.

Q. Both as to minimum qualifications and for rank order, for rank order qualifications?

A. For rank order qualifications, yes.

Q. Ms. Hall, as a part of the examination, was there a separate test or separate portion of the test given which involved hydraulics?

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A. Yes, sir.

Q. Why was this separate examination given?

A. Well, it really is not considered a separate examination. Hydraulics is definitely a part of the fire-fighting job.

Q. Was it considered by the examiners that hydraulics was one of the closest situations that they could present to the examinees on paper to test their knowledge and ability to perform the duties of a Fire Lieutenant?

A. Right.

Q. Was there any finding made that — as to how the blacks performed on the hydraulics examination as related to how they performed on the examination in chief?

A. Well, I believe I noted on my examiner's sheet that those who scored well on the written examination also scored well on the hydraulics, and there was a correlation run.

Q. Were there blacks who scored well on the written examination?

A. Yes.

MR. FITZPATRICK: We offer Plaintiffs' Exhibit 1.

MR. WHITESIDE: Your Honor, I am not sure why it is being offered. I assume that you are not going to rule on any validity of the examination.

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THE COURT: I certainly do not expect to and certainly not at this stage of the case. Whether that might be appropriate in some way in further proceedings in this case at a later time, I would reserve judgment.

MR. WHITESIDE: With that, we won't object to it.

THE COURT: Exhibit 1 is received.

(Plaintiffs' Exhibit 1 was received in evidence.)

Q. (By Mr. Fitzpatrick) Ms. Hall, what are the factors that the Board employs in setting the pass point?

A. Well, we do a compilation of the test statistics. We consider how well the group as a whole did on the examination.

Q. And are those compilations and studies included in Plaintiffs' Exhibit 1?

A. Yes, but there are other factors as well.

Q. Is it not — is it true that pass points are normally set between 50 and 70 percent of the number of correct answers, number of correct answers on the raw score?

A. Not in our system.

Q. Do you know what the percentage of correct answers was set at in setting the pass point in the present Fire Lieutenant Examination on the pass —

A. I am sorry. I missed part of it. I want to be sure I understand the question.

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Q. Okay. How many questions were there on the January 26th Fire Lieutenant's Examination?

A. After review, there were 218 that were scored.

Q. 218. How many correct answers were necessary to pass the exam?

A. Passing point was set at 108 correct answers.

Q. 108?

A. Uh-huh (indicated yes.)

Q. So do you know what percentage - I don't have my calculator here - 108 is of 218? In other words, what percentage of correct answers did the examinee have to have in order to —

A. In this case, they would have answered half of the examination.

Q. 50 percent?

A. Uh-huh (indicated yes.)

Q. Okay. Ms. Hall, is it not a fact that the pass point is usually set somewhere between 50 and 70 percent?

A. Not necessarily. There are a number of factors that enter into the setting of passing point.

Q. If the pass point has been set at 70 percent of raw score, then how many points — how many correct answers would one have to have had in order to pass the exam?

A. Well, can ycu multiply 70 times 218 for me?

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Q. I will get right to the point. In the — in Plaintiffs' Exhibit 1, there is a finding concerning why the pass point was set at 108. Can you read that from my copy, please?

A. Okay.

THE COURT: What page?

MR. FITZPATRICK: I don't know.

THE COURT: What segment of the study?

THE WITNESS: It is the segment of the Examiner's Manual on the setting of passing points. It is towards the back.

THE COURT: Go ahead.

Q. (By Mr. Fitzpatrick) Okay. Go ahead.

THE COURT: I found the page.

MR. FITZPATRICK: It is the handwritten page.

A. The portion you have asked me to read is, "A score of 108 provides a register of eligibles for each participating jurisdiction and a suitable register of black candidates for Birmingham in order to comply with the provisions of the consent decree. All candidates will have answered at least half of the examination correctly."

Q. (By Mr. Fitzpatrick) Was the pass point set at 108 simply because of the consent decree?

A. No.

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Q. What other factors entered into that?

A. Well, I think we also have said that we have other jurisdictions besides the City of Birmingham under the system; the City of Hueytown, for example.

Q. Ms. Hall — excuse me. Go ahead.

A. Expected to fill a vacancy.

Q. Okay.

A. Or one of the smaller jurisdictions expected to fill a vacancy.

THE CLERK: Plaintiffs' Exhibit Number 2 marked for identification.

(Plaintiffs' Exhibit Number 2 was marked for identification.)

Q. (By Mr. Fitzpatrick) Would you identify what has been marked as Plaintiffs' Exhibit Number 2 for identification?

A. This is the Eligible Register established for Fire Lieutenant on 1-26 — based on the examination of 1-26-82 and approved 3-23-82.

MR. FITZPATRICK: We offer Plaintiffs' Exhibit 2.

THE COURT: Received.

(Plaintiffs' Exhibit Number 2 was received in evidence.)

Q. (By Mr. Fitzpatrick) Ms. Hall, do you know what the score of — did you say it was Hueytown that you had to certify people for?

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A. I am — hold on a second. I believe it was the City of Irondale.

Q. Three people were certified from Irondale. What were the test scores of the three people from Irondale?

A. The range of scores for the City of Irondale was 109 to 156.

Q. So that means all three people who were certified from Irondale either had 108 or 109?

A. Uh-huh (indicated yes.)

Q. Ms. Hall, is it normal to have 91.3 percent of the people who took the exam pass?

A. Well, I don't know what "normal" is, but every examination is considered separately. We establish a passing point based on the needs of our service and the overall examination statistics and results.

Q. In comparison to past examinations, was the pass point set at a low point on this examination?

A. In comparison to Fire Lieutenant Examinations?

Q. Yes, ma'am.

A. It was higher than last year's passing point.

Q. Well, is Fire Lieutenant a position which has a high turnover rate?

A. No.

Q. Is Fire Lieutenant a position which has a high waiver rate?

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A. No.

Q. Okay. How many positions did the City of Birmingham claim it would need to fill in the upcoming year?

A. I don't know that they made a claim.

Q. Did you have an expectation as to how many they would need to fill?

A. We usually make an estimate on our sheets.

Q. What was your estimate for this year?

A. I don't really remember. If you have it there, I will be glad to read it for you.

Q. I don't know where it would be.

A. We made an estimate. Seems like —

Q. Would it be in Plaintiffs' Exhibit 1?

A. Yes, it is. Perhaps ten. I believe ten was the figure last year.

Q. Ms. Hall, in determining whether the examination was job-related for both minimum qualifications and rank order determination, as far as determining the relative qualifications of the examinees, were the Department of Justice and EEOC guidelines employed?

A. The consent decree stipulated what the requirement would be.

Q. Were they employed?

A. And those were employed, yes.

Q. They were determined to be job-related?

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A. We did not sample that because we had no alternative.

Q. I don't understand your answer. Could you explain?

A. I am telling you that we were told — we agreed in the consent decree that the requirements would be what they were on the announcement.

Q. I am just not following that.

A. You are talking about the in-grade time and that was specified in the consent decree.

Q. I understand that. I am saying employing the Department of Justice guidelines and the EEOC guidelines and in determining whether the examination was job-related, did you employ those guidelines and then determine that the exam was job-related? Yes or no.

A. Yes.

Q. Okay. So is it your conclusion and testimony that if somebody scored higher on the examination than another person, they have been demonstrated to possess a superior qualification to perform the job of a Fire Lieutenant as measured by a job-related examination?

A. Yes, I would say so.

MR. FITZPATRICK: Thank you.

THE COURT: Any examination?

MR. WHITESIDE: Yes, Your Honor.

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CROSS EXAMINATION

BY MR. WHITESIDE:

Q. Ms. Hall, have you completed your validation efforts?

A. Well, it is a difficult thing to pronounce validity on any examination and this examination had been administered the one time.

Q. Are you continuing to try to validate the test?

A. We will continue. Yes, it is a validating process always.

Q. Ms. Hall, when you decided to set the passing point for the Fire Lieutenant Examination, did you before setting the passing point review the distribution of the test scores?

A. Certainly.

Q. And did you review the statistical analyses that you had performed and analysis concerning reliability and the analysis concerning the hydraulics correlation of the written test?

A. Yes.

Q. Did you review the number of anticipated vacancies for the job?

A. Yes.

Q. Did you review the level of difficulty of this particular test which was administered in 1982 with

[Page 24]

previous tests administered for Fire Lieutenants?

A. Yes, that is all part of the system.

Q. Did you also review the consent decree to determine what goals would be necessary in doing that?

A. Right.

Q. And as a result of making that review, did you reach a passing point that would have an implied level of minimum competency?

A. Yes.

Q. And is that a standard practice the Board follows?

A. Yes.

Q. With regard to the test, the Fire Lieutenant's Test you gave in 1982, was it a different test than the previous test?

A. Yes.

Q. And in the particular test, the one that was administered in 1982, did you require more correct answers on this test than you had in previous tests?

A. Yes.

MR. WHITESIDE: That's all.

THE CLERK: Defendants' Exhibit Number 1.

(Defendants' Exhibit Number 1
was marked for identification.)

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CROSS EXAMINATION

BY MR. ALEXANDER:

Q. Ms. Hall, let me show you what has been marked for identification as Defendant City of Birmingham Exhibit 1. Do you recognize that, please, ma'am?

A. Yes.

Q. Could you tell the Court what that is?

A. It is a compilation of the scores of the Fire Lieutenant's Examination and contains the raw score of each individual in the City of Birmingham, the raw score, rank, the converted score, the seniority points, the final score and the final rank.

Q. This lists each individual who took the examination in January and the second column is in fact the number of correct answers out of the 200 odd you have testified to?

A. That is correct.

Q. Would it be your judgment, ma'am, that there would be a significant performance difference between a raw score 168 and a raw score 169?

A. No. There is always some measurement in an examination.

MR. ALEXANDER: The City offers this Exhibit 1.

THE COURT: Received. Anything else?

(No response.)

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(Defendants' Exhibit Number 1 was received in evidence.)

THE COURT: You can step down. Thank you.

MR. FITZPATRICK: I have one further question.

MS. REEVES: Your Honor, may I be allowed to ask questions of Ms. Hall?

THE COURT: Surely.

CROSS EXAMINATION

BY MS. REEVES:

Q. Ms. Hall, do you know whether or not the test has a disproportionate adverse impact upon white applicants who are taking the test or —

A. No, it does not.

MS. REEVES: Thank you.

REDIRECT EXAMINATION

BY MR. FITZPATRICK:

Q. Does the exam have a disproportionate impact upon blacks?

A. No.

Q. Would a score of 168 be - how do they phrase it - a significantly different score than 180?

A. Yes.

Q. Would a person who scored 180 be demonstrably

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better qualified for the job than a person who scored 168?

A. He would have somewhat more job-related knowledge than the person who scored 168.

Q. So if — was the second — if Defendants' Exhibit 1 shows that Plaintiff Floyd Click scored 180 on the exam then he is demonstrably better qualified for the position of Fire Lieutenant than the 23rd person which is Mr. J. E. Lassetter who scored 168?

A. The answer that I gave you applies.

Q. Excuse me.

A. He has somewhat more job knowledge than the person who scored 168.

Q. And in your opinion, he has been shown to have superior qualifications for the position?

A. On our exam which is job-related, yes.

MR. FITZPATRICK: Thank you.

THE COURT: All right. You can step down. Thank you.

(Witness excused.)

THE COURT: Before I hear oral argument, I am going to take a short recess so that I may read the affidavits that have been submitted and such perusal of the exhibits as I think will be helpful in order to better understand the nature of the argument. Let's

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take a recess at least initially for about 20 minutes and see if that is enough.

(Break held.)

THE COURT: All right. Oral argument on behalf of the Plaintiffs. In view of the brief, I would suspect you not to be unduly repetitive.

MR. FITZPATRICK: If the Court has had an opportunity to review the brief, I will not then recite it to the Court.

First of all, the evidence clearly shows that the three people who were promoted last August were promoted on the 12th. There is no evidence to the contrary. We have — they were offered the positions. They accepted the positions and they assumed the duties. I have got some real problems with that in that the — when the City requested a certification, they said that five have been appointed since the decrees were entered. I think it speaks for itself, Your Honor.

As far as the validity of the exam, the evidence before the Court clearly shows that the examination was job-related and

was validated according to applicable regulation, and the Plaintiffs are shown by the exhibits to demonstrate superior qualifications.

THE COURT: All the Plaintiffs?

MR. FITZPATRICK: I will let those documents speak

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for themselves, Your Honor. I received them yesterday and they are interesting. I will say that. I do think that the seniority — the application of the seniority points is a valid use of job-related criteria to rank them according to their relative qualifications. In conjunction with the examination under American Tobacco vs. Patterson, they have the — I am the Plaintiff here, but another party opposing a seniority system would have to show that it is — that the use of those seniority points is for the intentional purpose of discriminating against blacks.

THE COURT: I think that is apples and oranges to some degree because the position you are stressing here is that under the terms of the decrees, some or all of the black applicants either are not qualified or are demonstrably shown to be less qualified than whites. The mere fact that you may consider in a seniority or merit system service would not necessarily reflect lack of qualifications or less qualifications by someone who had fewer years.

MR. FITZPATRICK: At any rate, I think the evidence does indicate that at least some of the Plaintiffs are — have been demonstrated and the evidence is uncontradicted at least, especially as to Mr. Click, that he possesses superior qualifications based upon job-related

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examinations than any of the black persons. The evidence is also uncontradicted that Mr. Click has been told by the Chief speaking for the City that he will not get a position, even though he has been certified, because of race. The interview process was really a — just a farce as far as he was concerned. The affidavit speaks for itself.

THE COURT: Let me ask you this —

MR. FITZPATRICK: Yes, sir.

THE COURT: Assuming the Court agrees with you that three of the previously appointed five individuals who are white were appointed prior to the entry of the decree, nevertheless there would be two whites appointed after the decree and there would be some whites being appointed by your approach from this certification; would it not?

MR. FITZPATRICK: I don't quite understand your question. I think what you are saying is: Can the City go ahead and appoint two blacks, even if two whites have been —

THE COURT: Not only two but you are talking about six additional appointments at this point.

MR. FITZPATRICK: Yes, sir.

THE COURT: If you take that six plus the two that you would acknowledge were appointed after the entry of

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the decree, that is a total of eight appointments made after entry of the decree.

MR. FITZPATRICK: So could not four have been black? Well, Your Honor, I, first of all, believe that a certification made pursuant to an erroneous request which has a false statement on its face should be enjoined and they should go back through the request process again and make a new certification and based upon true facts —

THE COURT: Well, it would result in the same situation basically, wouldn't it?

MR. FITZPATRICK: I don't know. I have heard rumors. I have heard that the City is not going to go ahead and appoint five blacks. I have heard they are going to appoint less. I have heard they are going to reject some.

THE COURT: Go ahead.

MR. FITZPATRICK: Okay. The legal issues, Your Honor, speak for themselves. I believe we can collaterally attack the decree. Res judicata and collateral estoppel do not apply. We were not parties. We were just not parties in the prior proceeding. A party who was not a party at the prior proceeding but who is affected by the judgment in that other case, especially a consent judgment, is entitled to collaterally attack the judgment

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as to the validity on its face, and I think the legal argument speaks for itself on that point. I believe we have shown in our brief irreparable injury. We have shown that a temporary injunction — temporary restraining order would maintain the status quo; that the City would not suffer any great injury by setting this matter over until we can have a hearing on a preliminary injunction. The positions have been open, some of them, since October the 31st. As far as the ten-day rule is concerned, the ten-day rule, as I understand it, is only enforced by the Board in situations where a final certification has been made and the Board in a routine manner accepts late returns on certifications. I don't think we — I don't think the ten-day rule should be staring us in the face as to whether or not a restraining order can be granted. I also believe that should the City be enjoined from making an appointment from the certification list during the ten-day intervening period, that the applicants would be told during that time that they have been enjoined, so I think we have proven the points necessary for the Court to grant temporary relief and we thank the Court for its time this morning.

MR. ALEXANDER: Your Honor, the documents before the Court do indicate there is contrary evidence to the

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affidavits submitted by the individuals with respect to the August appointment. The Chief's affidavit as well as Exhibit 1 to that affidavit reflect, if you will, that the appointments were made on the 22nd. Passing that, I don't think it makes a whole lot of difference. I don't think — we would not construe the decree to stand for the proposition that we must maintain our

balance month by month, day by day. We would assume that our performance under the decree would be assessed at the conclusion of a year. We don't think that there would be anything to prevent us from, as we did, appointing whites and then following with blacks or appointing blacks and following with whites as long as the balance is achieved.

With respect to the legal issues concerning a race conscious remedy, the Court has passed on that. These same objections were urged and indeed the Court focused on this problem and the inquiries of the City at the fairness hearing, which is impending in the Court of Appeals. I don't know of any intervening law or any intervening events which would indicate it would be appropriate for the Court to assess that question at this time. Although I have not made a study of this here, I am not satisfied that the Court would have jurisdiction with respect to that at this time.

With respect to the question of qualifications,

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there are really two arguments that the firefighters make, as I said. One is the representations of Mr. Gray that the seven individuals are more qualified, more superior qualifications, in his terms. The other is that some certification out of rank order is somehow inconsistent with the absence of qualifications or at least relative qualifications. To the first point, the Chief, whose responsibility it is to make these evaluations and whose responsibility it is to insure the efficiency of the department, has asserted that it is his belief that none of the seven whites are in fact demonstrably better qualified. We think it is between Mr. Gray and the Fire Chief that the Fire Chief — and while there is conflicting evidence on that, that our position is strong.

With respect to the question of certification out of rank order, Ms. Hall's testimony indicates that while the Personnel Board has reached tentative judgments about the certification examination, they are continuing their study and presumably have not at this point come to the Court and have no intention at this time of saying that this examination is valid such as to relieve them of their options under the decree. Accordingly, I

don't think that the firefighters are in a position to make a showing that we are appointing less qualified

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people.

On a TRO - and we have made this argument before and I won't repeat it - but I am just not satisfied that the firefighters, or perhaps more accurately the Defendant, et al, are in a position to argue that there is irreparable injury. We are prepared to make appointments from this list. If it is a conclusion by this Court at some point that we have erred, damage, injunctive remedies are fully available and there is simply no reason to interfere with the process when this Court can protect any of these individuals in the event we are concluded to be wrong.

One final point: With respect to the rumors that Mr. Fitzpatrick refers to, the City's intention at this time absent a restraining order from this Court, is to appoint four of the five blacks certified, certified to us, excluding Mr. Ward. Our review of Mr. Ward's history in the department suggests that he is not a candidate at this time. We would appoint, or it is our present intention to appoint, Mr. Bennett, to request from the Personnel Board a new certification. Again with our goals in mind with respect to the other vacancy which is presently open.

THE COURT: I am not sure I understand you on that.

MR. ALEXANDER: Our intention, Your Honor, from the

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list that we presently have requesting individuals for six positions is to appoint five. Four of the five blacks, excluding Mr. Ward and Mr. Bennett. We will then request from the Personnel Board another list for the remaining open position with the goals of the City in mind. These will be its commitment under the decree. We plan to fill five positions; four with blacks, one white; request another list for the sixth position.

THE COURT: What you are really referring to is through the vehicle of having another certification list to bring Mr. Harris up?

MR. ALEXANDER: I don't know that we have Mr. Harris in mind. We would examine whoever the Personnel Board sends to us. I don't know that we have anyone in mind, Your Honor. We would want to — the practice in the Fire Department is to review these individuals as they are certified. We will do that and make judgments on that basis.

Does the Court have further question about that?

THE COURT: Sounds like a continuing problem between the City and the Personnel Board but —

MR. ALEXANDER: It is a continuing problem between the City and perhaps the Personnel Board, but not certainly. It is not unusual for us to find reasons why someone who has been conditionally certified is not a good candidate

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for reasons outside the examination procedure for a particular job. That points to, I think, a continuing problem under this decree. It would seem to me that if the Court in effect says the TRO is warranted in this procedure, that any time there is an out-of-rank appointment, if you will, that we invite repetition of what has happened here. Again, I don't believe that there is any reason to do that when you consider that the City is fully capable of remedying any wrong it might inadvertently commit, and we don't believe in this case that there is any warrant.

THE COURT: Does the Personnel Board have any comment?

MR. WHITESIDE: Excuse me a second, Your Honor.

(Pause.)

MR. WHITESIDE: Your Honor, we don't have an argument. We have an argument between ourselves.

(Laughter.)

THE COURT: Intervenors?

MS. REEVES: Yes, sir. Our part is easy since I am the only one here. There is no one to argue with me.

We would take the position with the Court before any review of the evidence that the Court in essence lacks jurisdiction to grant a TRO in this case and the reasons are several: First, the complaint represents an

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attack upon the constitutionality and the authority of the Court to implement a decree which has already been approved. The issues which the Plaintiffs in the Bennett case raise are the very issues which are on appeal and the rule is that once a District Court had entered a final order and those issues have been taken on appeal that the District Court does lose its jurisdiction. Secondly, in the jurisdictional matter, the Plaintiffs here seek relief in part under Title 7 of the Civil Rights Act and allege that as a basis for relief, but there is no allegation that administrative exhaustion — and we have heard no evidence today that would even amend the complaint as it stands to show any administrative exhaustion through Title 7. There is no private cause of action under the grounds of the — under the Crime [Control] and Safe Streets Act or the State Local Physical Assistance Act. There is another ground which is 42-USC-Section 1981 on which they allege a jurisdictional ground and for that we would direct the Court's attention to a 1979 Fifth Circuit Case of Hefner vs. The New Orleans Public Service, Inc., and in Hefner, there was a — there was the issue presented to the Court of a collateral attack on a previously entered Title 7 consent decree. And there the Court — Mr. Hefner had attempted to exhaust through EEOC. He filed his charge with EEOC, I believe,

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the day before the consent decree was entered, but the Court went right to the heart of the matter and said, "We find that he is barred by laches. He knew of the pending case and we are not going to allow through a collateral attack on a long fought

and an honestly negotiated consent decree an attack on our existing decrees," and cite, among other cases, a case with which this Court is most familiar, [Allegheny-Ludlum] vs. United States. And saying in effect — allowing these suits as a public policy matter would severely undercut the public policy grounds of favoring consent decrees, but in the Hefner case, the Court also noted but decided that laches barred Mr. Hefner; that there were three other circuits which had held that indeed the Court did lack jurisdiction when there was a collateral attack on a consent decree, and the Hefner — at Footnote 14, those cases at the circuit which had taken that position are listed. The Hefner case is at 605 F. 2d 893.

If the Court could envision what might happen if a TRO were here granted, under circumstances where we have a pending appeal, if the Court should decide that a collateral attack is proper, what we have here is a situation where the Plaintiffs seek to enjoin the use of goals quotas in the Fire Department, although the complaint is broadly enough expressed so that it really

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isn't an attack on the goals throughout, that are stated throughout the decree. We might have a situation where the Fifth Circuit would uphold the decree which has been approved, but where we would have a District Court, a District Court decision in which the decree itself would be subject to attack. Not only that, it would encourage others throughout the — who are also affected by the other provisions of the decree to entertain further suits and to file for their suits where we have as we believe a valid decree.

Ms. Hall's testimony showed that there was no disproportionate impact regarding the tests on any whites and as a result of that statement, we would argue that the Plaintiffs in the Bennett case have no standing to argue, no standing to raise any problems with respect to the test. The statistics in the Fire Department, what we are talking here about is even though the decree talks about a 50 percent goal, which goal is limited by the fact that there are available and qualified persons to meet that goal, is a situation where there are of the 140 lieutenants,

captains and battalion chiefs in the Birmingham Fire Department, none are black. We are really talking now about promoting the very first black to a supervisory position in the Fire Department, and this is in a department where in the past there has been restrictions

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until 1958 which limited employment in the Fire Department for whites only.

There is — Mr. Fitzpatrick remarked about the fact that there was soon to be — there was a conflict in the evidence and he challenged the statement which appears in the certification list that there were five blacks — five whites who have been already selected for the position of Fire Lieutenant. Whether there have been five whites or three whites or two whites pursuant to the decree is of no moment. There is nothing in the decree which intends to remedy past discrimination which requires when there is the use of a goal the selection of whites first and then blacks as a last matter. Whether there have been whites or blacks selected should make no difference in the Court's consideration of the TRO.

Our last argument is — addresses itself to the attachment of Mr. Gray in his second affidavit which is that basically since the Department of Justice has changed its position on goals attaching the Assistant Attorney General for Civil Rights testimony that therefore somehow or another that amounts to a legal reason or a legal justification for the issuance of a TRO. There are no Republican decrees and there are no Democratic decrees. This is a situation where we were governed by

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controlling rules of law. We litigated the case of the controlling rules of law and it should not be influenced in any manner nor — and certainly not controlled by the public policy statement of political officials.

Lastly, the Plaintiffs in this case have not met the preliminary injunction standards under Title 7. The Middleton-Currington case which we had previously discussed in Chambers

indicates that sometimes they are — in Title 7 cases there can be an issuance of preliminary injunction properly issued where someone may be denied on an illegal ruling which is sex or race, but in that case, the Court made it clear that it was absolutely imperative that one go through the administrative process first. Thank you.

THE COURT: The Court views the legal basis here of the Plaintiffs' attack attacking the consent decree, the terms of it, as being without merit, or at least being of merit only as it may be addressed through the current proceedings. To the extent they are properly in this Court rather than in the Court of Appeals, the Court believes them to be without legal foundation and merit. Of greater difficulty is the aspect of the complaint which relates to the application and implementation of the decrees as it relates to the current situation. At present time, the list of those certified includes

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eight persons who are not black and five who are black for the potential filling of six positions. The Plaintiffs have urged that the grading used by the Personnel Board which gives rise to these listings is in error in effect by setting a passing or cut-off score at such point as to have a much larger percentage of persons found to pass and in turn be qualified than in prior years. And I take it the Plaintiffs also are attacking the failure of the Personnel Board to use the 70 percent score as a cut-off score. Certainly the materials that the Personnel Board has do indicate 70 as a form or means of arriving at a cut-off score, although the application of that is certainly one that depends upon judgment and it is not merely a flat approach. It is an approach to the setting of cut-off score.

It is perhaps significant in as far as the use of 70 versus a 50 raw score, 50 percent, that this particular test is not the only time it has been done. It was done the very last time according to the evidence presented that the Fire Lieutenant's Exam was scored. Indeed a somewhat lower percentage of correct answers was required on the last exam prior to the consent decree than this one. In as far as the attack upon the failure to use 70 percent raw score as a cut-off point,

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the Court does note that two of the five blacks who have been certified are below that 70 percent score. The Court also notes that one of the whites who has been certified is below that same score, but is held consistently with its application for cut-off score nevertheless to be qualified. In as far as the — I say I do not view the Personnel Board's adoption of this cut-off score as being wrong or certainly I do not view it as an issue on which the Plaintiffs are likely to prevail. It is possible that one might prevail in showing that this was an inappropriate cut-off score resulting in the deeming of people to be qualified who in fact were not. I think it is unlikely however that the Plaintiffs can prevail on that position. There is the question about the language in the consent decree which not only says that there is no requirement to promote someone who is not qualified, but that there is no requirement to promote someone who is demonstrably less qualified than others based on validated testing procedures.

I call to the attention of the parties that the evidence presented to me does indicate a standard error of measurement according to one computer printout of 5.78 on the score, and even if one uses the normative plus or minus two SEM's in order to ascertain true scoring, true test scores, what it means is that there would have

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to be even on that basis a difference of some 22 points in raw score before or 23 points before one could say from a psychometric standpoint that the scores were in fact different for the two individuals or at least to say that with the requisite degree of statistical certainty.

It may be noted here that only with respect to one of the whites certified is there a four SEM difference from the highest black who is on the list. It may also be noted, of course, that the actual test scores of whites and blacks, all 13 of them, are to some degree interspersed with blacks coming in the middle or at least some of the blacks coming in the middle of some of the whites' socres [sic] as well as there being one black at the

thirteenth point. The Court thinks it is unlikely that the Plaintiff could prevail in showing the requisite demonstration of higher qualifications of whites on the certified list as compared to blacks, with the sole exception of Mr. Ward, whose score is not only the lowest out of the group and indeed lower than any 70 percent gross score, but is almost four SEM's below the lowest white score of any on the list, which itself was below the 70 percent raw score rather.

The Court would be prepared to restrain the City from appointing as an application of the consent decree

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Mr. Ward; however, I understand the City to be indicating that such a requirement, restriction is not necessary in that the City does not anticipate the appointment of Mr. Ward from the list. Based upon that statement, I will decline to issue any form of temporary restraining order; however, I would say that counsel for the City should confirm that there is no intention to appoint Mr. Ward and that perhaps if there is some change of position on the part of the City that would make that a realistic possibility that the Court and counsel for the Plaintiff should be advised.

MR. ALEXANDER: The City will undertake that, Your Honor.

THE COURT: The application for a temporary restraining order is denied by virtue of the only point with which the Court might agree becoming in a sense unnecessary as I view it to be dealt with by a temporary restraining order. I do note that this action by the Court would effectively mean that only four of the five blacks could be appointed and that even if the Plaintiffs prevail on the point that the three whites first appointed to Lieutenant that are involved in this matter were found to have been appointed prior to the entry of the decree, it would still, if all positions are filled from the six being here requested

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together with the two whites previously appointed, result in the City's in effect having maintained a 50 percent appointment

ratio for whites, for blacks since the date of the decree which would certainly not be contrary to the decree itself. I do agree that the City is not obliged to keep itself on each appointment in line with the 50 percent provision of the decree. On the other hand, it is certainly permitted to do so and this, the result of this action by the Court will permit it to be in effect on that 50 percent basis if it chooses to be so at this point.

That is the decision of the Court denying the application for a temporary restraining order. There is next the problem of setting a date for a preliminary injunction. I think what I would request is that the parties indicate to me by Tuesday of next week, Number One, what discovery, if any, is requested prior to any such hearing and, if possible, an indication of what additional evidence would be tendered above and beyond that presented here. That could be of guidance in knowing when to set a preliminary injunction. I doubt that the Plaintiffs can prevent [sic] evidence that would cause a change of ruling by the Court, but it is possible. I never know until I see the evidence that might be presented, but that will be the decision. I expect to

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hear back from counsel so that I could be guided in terms of setting a date for a preliminary injunction, there having been no consent to treat this hearing as a preliminary injunction, but insists that it be only for the TRO which in one sense makes it non-appealable.

MR. FITZPATRICK: That's exactly what I wanted to bring up. Your Honor, there is a case —

THE COURT: That may have been one reason — I don't know why the Defendants declined to waive their five-day notice. I really don't know.

MR. FITZPATRICK: By your comments this morning, it is very clear that we would in all probability not receive a preliminary injunction. I personally have no further evidence at this time that I can produce for the Court, especially in view of the Court's comment on the legal issues which we admit are purely legal; that we would ask the court to deny our request

for a preliminary injunction on the legal issues. That can even be severed.

THE COURT: Let me stop you for a moment. I thought you indicated when I requested for this hearing this morning might be on the basis of preliminary injunctive relief as well as the TRO, that while you were willing to do so on the legal issues, there was further discovery that you wanted before proceeding on

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the preliminary injunction and it is in that light that I had just a moment ago indicated that perhaps you wanted to have some further discovery.

MR. FITZPATRICK: Well, Your Honor, the ideal situation for me at this time would be a severance of the legal issues.

THE COURT: That will not be permitted.

MR. CONWELL: Would you give us just a moment, Judge?

THE COURT: Sure.

(Pause.)

MR. FITZPATRICK: Your Honor, we did not know what evidence would be presented here. We now know what it is. We would request that this be considered as on the application for preliminary injunction.

THE COURT: Unless the Defendants agree to that, it cannot be so converted.

MR. ALEXANDER: The City is prepared to agree to that, Your Honor.

MR. WHITESIDE: So is the Board, Your Honor.

THE COURT: By waiver of the notice requirement from the City and upon agreement and request by the Plaintiffs, this hearing is deemed also to have been held as one for a preliminary injunction and the preliminary injunction is denied on the same basis and for the

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same reasons that the temporary restraining order is denied. The Clerk will be directed to make a brief minute entry indicating the fact of denial after hearing.

MR. FITZPATRICK: Your Honor, may I go ahead and file my notice of appeal in view of that and application for stay pending appeal?

THE COURT: You certainly may file with the Clerk. I have another matter to attend to. It was set at 10:30. You may file the notice of appeal with the Clerk. You may also file the application for a stay. That is denied.

MR. FITZPATRICK: Your Honor, we would request a limited stay until Monday morning.

THE COURT: That is denied.

MR. FITZPATRICK: Thank you, sir.

THE COURT: The Court will take about a ten-minute recess before calling the next case.

(All proceedings ended on April 23, 1982, at approximately 11:00 a.m.)

[Certificate omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S

ANSWER

For answer to the complaint herein, defendants Richard Arrington, Jr. and the City of Birmingham say as follows:

FIRST DEFENSE

The complaint fails to state a claim for relief against these defendants upon which relief may be granted.

SECOND DEFENSE

Plaintiffs have failed to join a party in whose absence complete relief cannot be afforded.

THIRD DEFENSE

To the extent this action is predicated upon a claim of discrimination on the basis of race, white, pursuant to Title VII of the Civil Rights Act of 1964, as amended, plaintiffs have failed to satisfy the necessary statutory pre-conditions for suit.

FOURTH DEFENSE

This Court lacks jurisdiction of the subject matter of this action.

FIFTH DEFENSE

Plaintiff James A. Bennett is without standing to bring this action.

SIXTH DEFENSE

Plaintiffs lack standing to bring this action.

SEVENTH DEFENSE

This action is barred by laches.

EIGHTH DEFENSE

For further answer to the complaint herein, defendants Arrington and the City of Birmingham say as follows with respect to each paragraph of the complaint respectively:

1. These defendants deny the allegations of paragraph 1.

2. These defendants are without sufficient knowledge or information to form a belief as to the truth as to allegations of paragraph 2 of the complaint and, accordingly, deny same.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. The City of Birmingham admits that it either is, or has been, a recipient of various federal funds as alleged.

8. These defendants admit the allegations of paragraph 8 except that these defendants are unaware of how many persons passed the fire lieutenant's examination and how they were ranked by the defendant Personnel Board, except as evidenced by certification forwarded to the City.

9. These defendants admit the allegations of paragraph 9 except that these defendants are unaware of the

number of persons who passed the examination and were otherwise eligible for promotion.

10. With respect to the allegations of paragraph 10, the City admits that it requested the Personnel Board to certify five persons for the position of fire lieutenant, admits that Exhibit A is a true copy of that request; otherwise the allegations of paragraph 10 are denied.

11. These defendants admit that, in response to their request Jefferson County Personnel Board furnished a certification list, a true copy of which is attached as Exhibit B to the complaint. These defendants deny the remaining allegations of paragraph 11.

12. These defendants deny the allegations of paragraph 12 of the complaint.

13. These defendants deny the allegations of paragraph 13 of the complaint.

14. These defendants deny the allegations of paragraph 14 of the complaint.

15. These defendants deny the allegations of paragraph 15 of the complaint.

16. These defendants deny the allegations of paragraph 16 of the complaint.

17. These defendants deny the allegations of paragraph 17 of the complaint.

18. These defendants admit the allegations contained in the first sentence of paragraph 18 of the complaint, except that these defendants deny that Henry Ward, Jr. was promoted to fire lieutenant. These defendants deny the remaining allegations of paragraph 18.

19. These defendants deny the allegations of paragraph 19 of the complaint.

20. These defendants deny the allegations of paragraph 20 of the complaint.

21. These defendants deny the allegations of paragraph 21 of the complaint.

22. The allegations of paragraph 22 of the complaint require no response of these defendants.

23. Except as herein expressly admitted the allegations of the complaint are denied.

24. These defendants deny that the plaintiffs are entitled to any relief whatsoever.

WHEREFORE, these defendants demand that a judgment be entered on behalf of these defendants and that these defendants be awarded their costs, reasonable attorney's fees.

/s/ James K. Baker
James K. Baker

/s/ James P. Alexander
James P. Alexander

/s/ Eldridge D. Lacy
Eldridge D. Lacy

Attorneys for Defendants

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

[Certificate of Service, dated May 3, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION of CITY EMPLOYEES, an unincorporated labor association; GERALD L. JOHNSON; PHILLIP H. WHITLEY; DAVID H. WOODALL; DANNY R. LAUGHLIN; MARSHALL G. WHITSON; DUDLEY L. GREENWAY; and, KENNETH O. WARE,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; JAMES B. JOHNSON, HENRY P. JOHNSTON, and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; JOSEPH W. CURTIN, as Director of the Jefferson County Personnel Board; JEFFERSON COUNTY PERSONNEL BOARD; and, the UNITED STATES OF AMERICA,

Defendants.

CIVIL ACTION NO.
CV 82-P-1852-S

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Rule 65(b), Federal Rules of Civil Procedure, the plaintiffs petition the Court to temporarily restrain the above named defendants and their agents, officers, attorneys, employees, successors, and assigns, and all persons acting in concert with them, from enforcing any of the promotional provisions of the consent decrees approved in Case Numbers

75-P-0666-S, 74-Z-17-S and 74-Z-12-S, and from in any way limiting the rights of plaintiffs to be certified for promotion and promoted to classifications within the City of Birmingham Engineering Department except strictly in accord with the provisions of Act No. 248 of the Regular Session of the Legislature of Alabama of 1945, as amended to date.

Petitioners have heretofore filed a verified Complaint questioning the validity of the said consent decrees and the application thereof to the plaintiffs. This Petition is filed in order to maintain the status quo until the Court can set down and hear the plaintiff's Motion for Preliminary Injunction. Plaintiffs and their attorney certifies [sic] that notice, by telephone, has been given to the office of the attorney for the City of Birmingham and the regular attorney for the Personnel Board defendants. Plaintiffs further state that the petitioner is in danger of suffering immediate and irreparable injury, loss, or damage if the defendants immediately enforce the promotional and certification provisions of the said consent decrees.

Petitioner further states that the Temporary Restraining Order sought cannot result in any injury to the defendants since the petitioner only seeks to maintain the status quo until the hearing on the petitioners' prayer for preliminary injunction can be heard.

In further support hereof, petitioner submits the verified Complaint sworn to by the plaintiff and offers to post such security as ordered by the Court.

WHEREFORE, petitioners pray for such temporary injunctive relief as prayed for above and such other general relief to which they may be entitled.

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.
Attorney for Plaintiffs

OF COUNSEL:

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[Certificate of Service, dated August 30, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, an unincorporated labor association; GERALD L. JOHNSON; PHILLIP H. WHITLEY; DAVID H. WOODALL; DANNY R. LAUGHLIN; MARSHALL G. WHITSON; DUDLEY L. GREENWAY; and, KENNETH O. WARE, *Plaintiffs,* v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; JAMES B. JOHNSON, HENRY P. JOHNSTON, and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; JOSEPH W. CURTIN, as Director of the Jefferson County Personnel Board; JEFFERSON COUNTY PERSONNEL BOARD; and, the UNITED STATES OF AMERICA, *Defendants.*	CIVIL ACTION NO. CV 82-P-1852-S

COMPLAINT

1. This Court has jurisdiction of this action under 28 U.S.C. § 1343 and 28 U.S.C. § 2201.

2. The individual plaintiffs are residents of Jefferson County, Alabama and over the age of twenty-one years, except plaintiff Laughlin is a resident of Blount County, Alabama.

3. Defendant City of Birmingham is a political subdivision of the State of Alabama and an employer within the meaning of 42 U.S.C. 200e(b).

4. Defendant Richard Arrington, Jr. is Mayor of the City of Birmingham and responsible for the administration and operation of the city government of Birmingham, including the hiring, assigning and promoting of employees of the City.

5. Defendant Jefferson County Personnel Board is an agency of Jefferson County established pursuant to the laws of the State of Alabama, is an employer within the meaning of 42 U.S.C. 200e(b), as amended, and is engaged in the procuring and screening of applicants and certification of eligibles for appointment with defendants named in paragraphs 3 and 4 and in the administration of a civil service system for such defendants.

6. Defendants James B. Johnson, Henry P. Johnston and Hiram Y. McKinney are members, and Joseph W. Curtin is Director of the Jefferson County Personnel Board, and as such they are responsible for its administration and operation, including the procuring and reviewing of applicant and certification of eligibles for appointment with defendant named in paragraphs 3 and 4.

7. Defendant United States of America is a party to the consent decrees entered in case #CV-75-P-0666-S, Northern District of Alabama.

8. Plaintiff Birmingham Association of City Employees (hereinafter "BACE") is an unincorporated labor association of employees of the City of Birmingham. The individual plaintiffs file as representative parties of BACE, as well as individually. Said plaintiffs will fairly and adequately represent the interests of the association and its members. Rule 23.2, FRCP.

9. Plaintiffs are white, male employees of the City of Birmingham. Pursuant to the provisions of Act No. 248 of the Regular Session of the Legislature of Alabama of 1945 as amended to date (hereinafter referred to as the "Civil Service Act"), plaintiffs have applied for, and taken the examination for, promotion to the classification of Civil Engineer of the City

of Birmingham. In partial discharge of their obligations under the Civil Service Act, the Personnel Board defendants and defendant Director ranked the persons who passed the Civil Engineer examination administered on June 14, 1982 and were otherwise eligible for promotion under the provisions of the Civil Service Act. The plaintiffs are among the top eight ranked candidates of the persons who passed and were ranked in the following order by the Personnel Board:

1. David H. Woodall
2. Kenneth O. Ware
3. Danny R. Laughlin
4. Phillip H. Whitley
5. Dudley L. Greenway
6. Jerry L. Henson
7. Gerald L. Johnson
8. Marshall G. Whitson

10. The following person is black male employee of the City of Birmingham who also has applied for, and took the examination for promotion to the classification of Civil Engineer of the City of Birmingham. Among the said persons who passed the said examination and were otherwise eligible for promotion, this said person was ranked as follows:

9. Lucious [sic] J. Thomas, Jr.

11. In August, 1982, the City through the defendant Mayor Arrington requested the defendant Personnel Board, through its Director, to certify to it persons for promotion to one open Civil Engineer vacancy.

Said request for certification requests that the Board and its Director certify names on the basis of race and further evidences the City's and Arrington's intention to promote employees on the basis of race. Plaintiff is further advised that all City department heads, including the City Engineer, have promised the Mayor to promote blacks.

12. Pursuant to the City's and Mayor's request, the Personnel Board defendants and its Director made a certification of names, a true copy of which is attached hereto as Exhibit A. The Personnel Board defendants and its director, intentionally and knowingly certified the fourth name on the Exhibit A certification on the basis of race. On or about August 18, 1982, the City promoted Lucious [sic] Thomas to the classification of Civil Engineer purely on the basis of his race and in violation of the Civil Service Law and the Fourteenth Amendment. Although the appointment has been made, it is not effective until September 4, 1982.

13. The defendants City and Arrington are following a policy of hiring and promoting their employees on the basis of race or color with black employees being employed, hired and promoted on the basis of their race in accord with numerical quotas or goals rather than purely upon merit and superior qualifications, all constituting illegal and unconstitutional discriminations against whites in hiring and employment practices.

14. The Personnel Board, its members and its Director are certifying candidates for hiring and promotion to the appointing authority on the basis of race, favoring blacks to the deference of whites, rather than in a color blind fashion and solely on the basis of merit, competition and superior qualifications.

15. The defendants are certifying candidates and making promotions on the basis of race under the assumed protection of consent settlements entered into and approved by this Court in Case Numbers 75-P-0666-S, 74-Z17-S, and 74-Z-12-S. The provisions of said settlements are illegal and the judgment of approval of said settlements is void on its face in that said consent decrees provide for defendants to act in a manner contrary to the provisions of the Civil Service Act, the Fourteenth and Fifth Amendments to the Constitution of the United States, Title VII of the Civil Rights Act of 1964, and other statutes as cited herein.

16. The failure of the Personnel Board, its members and its Director to certify only the first three persons on the register

of eligibles pursuant to the request is illegal and in violation of the Civil Service Act, as it is presently constituted.

17. The defendants' acts and practices described in paragraphs 11-16 constitute a pattern and practice of resistance to the full enjoyment of the rights of whites and plaintiffs in particular to equal employment opportunities within their jurisdictions and under their supervision and control. This pattern and practice is of such a nature and is intended to deny the full exercise of rights secured by Title VII of the Civil Rights Act of 1964, as amended, and is in violation of the obligations imposed by the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and the State and Local Fiscal Assistance Act of 1972, as well as rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and by 42 U.S.C. § 1981. Unless restrained by order of this Court, the defendants will continue to pursue policies and practices the same as or similar to those alleged in this Complaint.

18. Plaintiffs further allege that the aforementioned consent decrees, as said decrees relate to plaintiffs, contain illegal and unconstitutional remedies and are void on their face.

19. Plaintiffs aver and believe the appointment of Lucious [sic] J. Thomas, Jr. will be made effective on September 4, 1982. Such appointment of said person, on the basis of race, will cause immediate and irreparable damage and harm to plaintiffs, all in violation of their constitutional rights. The granting of a Temporary Restraining Order will not prejudice or irreparably harm the rights of defendants, but will maintain the status quo. Plaintiffs further offer to post sufficient security as set by the Court.

20. Plaintiffs aver that there is an actual controversy within the jurisdiction of this Court pursuant to 42 U.S.C. § 2201 as to the rights and other legal relations of the parties concerning the legality of the defendants' actions and the aforementioned consent decrees.

21. In the alternative, and not conceding the validity of the consent decrees, plaintiffs aver that defendants are not properly implementing the consent decrees in that the Personnel Board has certified for promotion and the City intends to

promote persons on the basis of race who have been shown to be demonstrably less qualified for the position of Civil Engineer, in violation of paragraph #2 of the City of Birmingham Consent Decree. There are real and substantial controversies between the parties governing the standards to be followed and duties of the parties in properly implementing the said consent decrees, which this court has jurisdiction to oversee and supervise. Defendants are ignoring the provisions of paragraph #2 of the City of Birmingham consent decrees and continuing to promote demonstrably less qualifed persons solely on the basis of race.

22. Plaintiffs offer to do equity.

WHEREFORE, plaintiffs pray that defendants, their official agents, employees, and all persons in active concert or participation with them be preliminarily and permanently enjoined from engaging in any discriminatory employment practice based on race, or sex, and specifically from:

a. Failing or refusing to recruit, hire, assign and promote white applicants and employees on an equal basis with black applicants and employees;

b. Failing or refusing to recruit, hire, assign and promote male applicants and employees on an equal basis with female applicants and employees;

c. Failing or refusing to eliminate qualifications, and other selection standards which have not been shown to be job related and which disproportionately exclude whites and males;

d. Failing to strictly follow the certification and appointment provisions of said Civil Service Act;

e. Enforcing or complying with the provisions governing promotional goals or quotas relating to promotions or special certification provisions so as to insure appointments in compliance with said goals as provided in paragraphs 5, 7, and 9 of the City of Birmingham consent decree and paragraphs 23 and 34 of the Personnel Board consent decrees, all as referred to in paragraphs 13 of this Complaint.

f. In the alternative, failing to enforce and follow the provisions of paragraph #2 of the City of Birmingham consent decree and failing to promote demonstrably better qualifed persons.

g. Failing to roll back the provisional appointment of said Lucious [sic] J. Thomas, Jr. to the classification of Civil Engineer.

Plaintiffs further pray that this Court will enter its declaratory judgment governing the rights, status and obligations of the parties and find the said consent decrees and judgment approving them to be void as illegal, unconstitutional, vague and indefinite, and violative of public policy. Plaintiffs further pray this Court will enter its declaratory judgment concerning the legality and validity of the actions of defendants as described in this Complaint, and for such other related declaratory relief to which plaintiffs may be entitled including this Court's declaration of the procedures and standards to be employed in fairly implementing the provisions of paragraph number two of the City of Birmingham Consent Decree.

Plaintiffs further pray for monetary and punitive damages, a reasonable attorney's fee for their counsel of record, and court costs.

Plaintiffs pray such other alternative or general relief to which they may be entitled.

/s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.
Attorney for Plaintiffs

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Dudley Lamar Greenway
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2162 Kent Way
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Marshall G. Whitson
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Summiton, Al. 35148

SERVE DEFENDANTS AT:

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City Hall
Birmingham, Alabama 35203

Personnel Board, Its Members, Director Curtin:
Annex, Jefferson County Courthouse, Room 301
Birmingham, Alabama 35203

United States of America
Attorney General William French Smith
Justice Dept.
Washington, D.C.

U.S. Attorney Frank W. Donaldson
Federal Courthouse
Birmingham, Alabama

[Certificate of Service, dated August 30, 1982, verifications and exhibit omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, an unincorporated labor association; GERALD L. JOHNSON; PHILLIP H. WHITLEY; DAVID H. WOODALL; DANNY R. LAUGHLIN; MARSHALL G. WHITSON; DUDLEY L. GREENWAY; and, KENNETH O. WARE,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; JAMES B. JOHNSON, HENRY P. JOHNSTON, and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; JOSEPH W. CURTIN, as Director of the Jefferson County Personnel Board; JEFFERSON COUNTY PERSONNEL BOARD; and, the UNITED STATES OF AMERICA,

Defendants.

CIVIL ACTION NO.
CV 82-P-1852-S

ANSWER OF DEFENDANT-INTERVENORS JOHN W. MARTIN, MAJOR FLORENCE, IDA MCGRUDER, SAM COAR, WANDA THOMAS, EUGENE THOMAS AND CHARLES HOWARD

In answer to each numbered paragraph of the complaint, the defendants John W. Martin, Major Florence, Ida Mc-

Gruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard admit, deny and otherwise respond as follows:

1. Paragraph one is denied.

2. Paragraphs 2-7 are admitted.

3. Defendant-intervenors are without sufficient information to admit or deny the first sentence of paragraph 8 and deny the remainder thereof.

4. Defendant-Intervenors are without sufficient information to admit or deny the allegations of paragraphs 9, 10, and 11.

5. Paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 are denied.

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The plaintiffs lack standing to bring this action.

THIRD AFFIRMATIVE DEFENSE

This Court lacks jurisdiction of the subject matter of this action.

FOURTH AFFIRMATIVE DEFENSE

This action is barred by *res judicata* in that the claim or claims herein asserted were finally adjudicated by judgment of this Court entered in the case of *John W. Martin, et al. v. City of Birmingham, et al.*, Civil Action No. CA 74-P-17-S, on August 18, 1981.

FIFTH AFFIRMATIVE DEFENSE

This action is barred by the laches of the plaintiffs.

WHEREFORE, defendant-intervenors pray that plaintiffs take nothing by their suit, that judgment be entered for the defendants and that defendant-intervenors be awarded their costs of suit and reasonable attorneys' fees.

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By /s/ Susan W. Reeves

[Certificate of Service, dated August 31, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, an unincorporated labor association, *et al.*, *Plaintiffs,* v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 82-P-1852-S

ANSWER OF THE PERSONNEL BOARD OF JEFFERSON COUNTY AND ITS MEMBERS AND DIRECTOR

Come now the Personnel Board of Jefferson County, its members, Henry P. Johnston, James B. Johnson, and Hiram Y. McKinney and its director Joseph W. Curtin and answer the complaint of the plaintiffs as follows:

1. The Personnel Board, its members and director admit the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 9, and 10 of the complaint.

2. The Personnel Board of Jefferson County and its members and director deny the allegations of paragraphs 14, 16, 17, 18, 20 and 21 and demand strict proof thereof.

3. The Personnel Board of Jefferson County and its members and director have insufficient knowledge to either admit or deny the allegations of paragraphs 13, 19 and 22 and demand strict proof thereof.

4. The Personnel Board of Jefferson County and its members and director admit the allegations of the first sentence of paragraph 8 and the first paragraph of paragraph 11, but the defendants have no knowledge as to the second and third sentences of paragraph 8 and the second paragraph of paragraph 11 and demand strict proof thereof.

5. The Personnel Board of Jefferson County and its members and director admit the first sentence of paragraph 12; deny the allegations of the second sentence of paragraph 12; demand strict proof of that allegation; have no knowledge of the remaining allegations of paragraph 12 of the plaintiff's complaint, but demand strict proof thereof.

Respectfully submitted,

/s/ David P. Whiteside, Jr
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

OF COUNSEL:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, an unincorporated labor association; GERALD L. JOHNSON; PHILLIP H. WHITLEY; DAVID H. WOODALL; DANNY R. LAUGHLIN; MARSHALL G. WHITSON; DUDLEY L. GREENWAY; and, KENNETH O. WARE,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; JAMES B. JOHNSON, HENRY P. JOHNSTON, and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; JOSEPH W. CURTIN, as Director of the Jefferson County Personnel Board; JEFFERSON COUNTY PERSONNEL BOARD; and, the UNITED STATES OF AMERICA,

Defendants.

CIVIL ACTION NO.
CV 82-P-1852-S

MOTION TO INTERVENE AS PARTIES DEFENDANT

John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard move to intervene in this action as a matter of right under Rule 24(a) of the Rules of Civil Procedure and to be permitted to in-

tervene pursuant to Rule 24(b) of the Rules of Civil Procedure upon the following grounds:

1. The complaint in this action alleges that certain provisions of a consent judgment entered by this Court in *John W. Martin, et al. v. City of Birmingham, et al.*, Civil Action No. 74-Z-17-S, are illegal and void and pray that their enforcement be enjoined.

2. The complaint in this case also alleges that the defendants in the case of *John W. Martin, et al. v. City of Birmingham, et al.* are not properly implementing the consent decree in that case.

3. Movants John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard are plaintiffs in the case of *John v.* [sic] *Martin, et al. v. City of Birmingham, et al.* and are entitled to enjoy the benefits of the consent judgment there in entered.

4. The consent judgment in the case of *John v.* [sic] *Martin, et al. v. City of Birmingham, et al.* is valid on its face and is not subject to collateral attack in another proceeding.

5. The interest of the movants, both on their own behalf and on behalf of others, in the integrity and proper implementation of the consent judgment in the case of *John W. Martin, et al. v. City of Birmingham, et al.* is such that the relief sought in this action, if granted, may as a practical matter impair and impede the ability fo [sic] the movants to protect that interest. None of the present parties to this action is a beneficiary of the terms of the consent judgment in *John W. Martin, et al. v. City of Birmingham, et al.* and none can adequately represent in this action the interest of the movants.

6. As appears more particularly from the attached Answer, which movants propose be filed if their Motion to Intervene is granted, the movants seek to assert defenses in this action that have common questions of both law and fact with those defenses assertable by the present defendants.

7. The Consent Decrees attacked require by their terms that the parties to said decree defend them when challenged.

A proposed answer of the movants is attached.

Movants request oral argument on this motion.

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Counsel for Movants

By /s/ Susan W. Reeves

[Certificate of Service, dated August 31, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

AFFIDAVIT OF JOHN DUNCAN

I, John Duncan, being duly sworn according to law, depose and say that:

1. I am a graduate Engineer and am employed by the City of Birmingham, Alabama as its city engineer.

2. I have been employed in the City's Engineer Department since June 10, 1948 and since that time have occupied successively higher positions in the Department until my appointment as Assistant City Engineer on September 22, 1970 which position I held until March 22, 1980 at which time I was appointed City Engineer.

3. In my 34 years in the Department, the highest rated position held by a black employee, prior to the promotion (effective September 4, 1982) of Lucius Thomas to the position of Civil Engineer, was that of Chief of Party. Lucius Thomas was appointed as Chief of Party on June 1, 1977.

* * *

/s/ John Duncan
John Duncan

Sworn and subscribed before me,
this 1st day of September, 1982.

/s/ Notary Public
Notary Public

[Exhibit and Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

CAPTION

The above entitled cause came on to be heard before the Honorable Sam C. Pointer, Jr., United States District Judge, United States Courthouse, Birmingham, Alabama, commening [sic] at 11:00 A.M., Thursday, the 2nd day of September, 1982, whereupon the following proceedings were had and done.

* * *

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PROCEEDINGS

THE COURT: All right. In connection with the application of the plaintiffs for a Temporary Restraining Order, it is first to be submitted to the Court certain items of documentary evidence as to which the only objections might go to relevancy, not as to authenticity. Perhaps we can have some identification of those.

If you will, hand those to Miss Clark.

* * *

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THE COURT: All right. Thank you. I do understand that. I take it still to be an objection as to relevancy?

MR. SPITZ: Yes.

THE COURT: And it is overruled at this point, but it is noted you need not repeat that on any further items of evidence, either documentary or by interrogation of witnesses.

MR. FITZPATRICK: I take it there is no need for me to respond to that?

THE COURT: No. All right. I take it the next item, then, is the short, brief examination of two witnesses.

Who do you wish to call?

MR. FITZPATRICK: Miriam Hall, please.

MR. FITZPATRICK: Your Honor, before I begin the examination, I did want to request the Court to take notice

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of the record in the *U.S.A. versus Jefferson County* case and the consolidated cases, 76-P-0666-S.

THE COURT: I will take judicial notice of those. It may, however, be proper to call my attention to some facet of that and with more particularity.

* * *

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THE COURT: All right. Anything else in the way

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of evidence?

MR. FITZPATRICK: No, sir, Your Honor.

MR. ALEXANDER: No, Your Honor.

MR. WHITESIDE: No, Your Honor.

THE COURT: Okay. The question is one of argument as to what I should do given this state of affairs. I, of course,

am familiar from both the consent decree and from an earlier suit of basic principles, but I would be happy to hear from counsel in terms of the application of those principles to this particular inquiry.

MR. FITZPATRICK: I will take two minutes, if I may.

THE COURT: Surely.

MR. FITZPATRICK: Your Honor, as far as the statistical evidence and inferences that can be drawn from that, I believe the argument in my brief — and I tried to make it as concise as possible in the brief, and yet lay it out for you — shows that the persons who have been certified are demonstrably better qualified according to job related examinations, which have been determined to be content valid for minimum qualifications and rank order. There is no evidence to the contrary.

THE COURT: By that analysis, however, I take it, for example, there is one white who is demonstrably better qualified than those who could have been appointed by the city engineer who had the top three eligibles only be

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certified?

MR. FITZPATRICK: Well, that may be, but then that is not a consent decree. That is a question of state law.

THE COURT: Excuse me. I interrupted.

MR. FITZPATRICK: No. I'm sorry. The seniority points had no impact on their ranking. Approaching it from a number of different approaches, either one standard error of difference, two standard errors of difference or four S.E.M., *et cetera*, as your Honor mentioned in the *Bennett* case, one, two and three are all demonstrably better qualified, as are four and six.

It is my personal opinion that one standard error of difference is a proper way, and that is also mentioned by Anastasia [sic] in her treatise, which Your Honor relied on in the regional trial in the case.

As far as the Personnel Board's argument concerning the applicability of S.E.M. in this case, there has been no evidence presented that it is unreliable. Concerning the type — I believe this is a proper time for the Court to begin to lay out some instructions or some guidelines for the City to follow in implementing paragraph two of the decree. That was one of the motivating forces behind the filing of this case. Paragraph No. 2 is in the decree, and the Court took it into consideration when the Court approved the decree, and we are relying on

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that in coming before Your Honor today.

I think state law provides that an interview is to be conducted, and all the persons are to be considered. The interview process in this instance was a sham. The whites were never given any fair consideration. It was more or less an automatic appointment.

We do raise the collateral attack, and I heard Your Honor's comments about that before, but, at any rate, it is raised. And, Your Honor, I think we can also see that if we sent Mr. Duncan — Mr. Duncan testified that there was a lot of supervisory work to be conducted by this particular person.

If one looks at the exhibit and takes the first component of the exam; that is, part one of the exam; as shown on the third page of my brief, number one scored 29; two, 26 and three, 31. Number nine scored 18 on that component of the exam, which we believe is a demonstrable difference or a significant difference in test scores on that part of the exam which measures supervisory public relations and civil engineering practice and theory.

Your Honor, we believe that the position has been open for some time, that the granting of a temporary restraining order would maintain the status quo until we can continue to develop the case. We think it's proper for the Court to lay out some instructions for the

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City as to the proper implementation of the decrees upon final submission of either the motion for preliminary injunction or the permanent injunction, and we are raising this particular instance as a case in point of how the City is going about the practice of implementing the decrees. The public interest will be served by the maintaining of the Personnel Board's civil service axism [sic].

No substantial harm will come to the City from a temporary delay pending final resolution of the motion for preliminary injunction. As far as irreparable injury is concerned, this is a continuing, chilling effect upon the rights of the plaintiffs to have — for equal opportunity for advancement.

As it is right now, they have zero opportunity for advancement. In fact, the people come to me and say, "the way it is now, if a black passes the exam, I have no possibility of promotion. Why bother taking the exam?"

Thank you, Your Honor, for hearing us this morning.

MR. ALEXANDER: Your Honor, on behalf of the City, we have dealt with a number of these issues before, and I don't want to burden the Court with what I perceive or how our position is and how it's going to stay.

The facts are; there were four people

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certified. Our man looked at four people, concluded that two had particularly irrelevant experience and selected the black. He selected the black in light of the fact that he had a 25 percent interim goal under the decree. No question about that.

And there is no question that under that goal, he was well below his interim level for 39 permanent placements on an interim or long-term basis. We believe the cases still continued to support that.

He testifies that Mr. Thomas is competent to perform the job. There has been no real challenge that Mr. Thomas is not competent to perform that job.

We think the intervention of a T.R.O. is unwarranted and simply not proper, given four factors of which the Court is familiar and weighed in this case as it has been weighed in others.

MR. WHITESIDE: Your Honor, unless the Court has some specific question, the Board would just rely on its trial brief and not present any more.

MR. RITTER: Your Honor, I just have a few general comments I would like to make since we are named defendants. My name is Richard Ritter; I'm an attorney with the Department of Justice.

The plaintiffs' complaint, insofar as it seeks to challenge the merits of the consent decree,

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constitutes, in our judgment, an impermissible collateral attack on the lawfulness of the consent judgment of this Court.

As the Court knows, that judgment was given final approval after a well publicized fairness hearing in August of 1981, and only after the Court had carefully assessed the merits of the proposed judgment and the objections made at the fairness hearing.

As far as I know, none of the individual plaintiffs here, nor the association, have registered any objection to the lawfulness of the proposed judgment at that hearing. Moreover, the arguments they now seek to raise in their complaint insofar as the merits of the consent decree are concerned were raised by others in the fairness hearing, that the Court ruled on the merits of those objections at that hearing.

Now, to the extent that the plaintiffs seek to challenge the implementation of the consent decree in this instance, it is our view that the proper course would be for the individuals with these kinds of grievances to seek permissive intervention in the lawsuit that generated the consent decree and not to file a separate lawsuit such as we have here.

To permit this lawsuit, as there is seven other lawsuits recently filed by city employees with similar

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grievances to perceive their separate ways through the judicial system, would fail to serve, in our judgment, the orderly administration of justice, can only invite continuous fractious litigation by other city employees and, I think, unduly hamper the City's efforts to comply with the consent decree.

MS. REEVES: My name is Susan Reeves and I represent the intervening Martin plaintiffs. We would add that the collateral attack is improper, that the conditional remedy of back-pay is available, and if indeed in the course of other proper litigation that any of the plaintiffs are determined to have been more qualified or under any standard should have received a promotion, this is simply not a situation warranting a T.R.O.

There is no allegation, even in the complaint under Title Seven, which is alleged to have been violated. E.E.O.C. Commission can file any change or any contact or meeting with those administrative prerequisites. Apparently the T.R.O., which is sought, is based solely on the difference in the test score. And the evidence was the selecting official, Mr. Duncan, was not even aware of the test score.

Nor was the test score the only selected factor. It was simply one factor among several. Another, the experience, and that Mr. Thomas, who was selected, has

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substantial experience. The selection of Mr. Thomas, in Mr. Fitzpatrick's questioning, has met the goal. Whites are not going to be prohibited hereinafter and forever and always from being selected from promotion.

The selection for the first time, the first black civil engineer, has satisfied the obligations under the consent decree, and it appears that in fact that the job has been offered, has been accepted, the recommendation made, and the appointment accepted. Indeed, there is not a vacancy.

If we were in the situation where we had a man who had to leave one employer and go to another after he has been offered and accepted a job, we would say there isn't a vacancy for the Court to hold open.

Last, with respect to paragraph two, the language of the decree says nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, transfer or promote a person who is not qualified.

We are not talking here about a requirement of the City to hire. We are talking about a selection of the City's own volition in compliance with the decree. Moreover, we think that, lastly, that this decree and this selection is fully in compliance with the doctrine of [*Weber*] as has been decided by the Supreme Court.

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MR. FITZPATRICK: Your Honor, as far as the argument of the government concerning the separate lawsuit, as in the *Bennett* case, this Court exercised supervisory jurisdiction over implementation of the consent decrees in guiding the *Bennett* case through the trial level before it was appealed. And the reason why we filed a separate lawsuit and paid $60 more, really, is simply to raise the collateral attack issue. We could —

It really makes no difference whether it is filed under a separate number of [sic] not. This is the first time that one of these positions has come open since 1973. It — effectively, the whites have been denied any opportunity for promotion, and by Mr. Duncan's own testimony, he does not expect such a position to come open for several years, by which time this current list will have expired.

As far as Ms. Reeves' argument about what the decree says, nothing herein requires the promotion of a less qualified person. The decree is the only basis upon which the City is permitted to make a race-conscious promotion. Without the decree, they have to follow the Personnel Board law.

Personnel — under the Personnel Board law, the man would never have even been certified in the first place. Without — Mr. Duncan's own testimony says that he is just following the decree, and it is his interpretation

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that the decree requires him to make the promotion.

We thank the Court for hearing our argument.

THE COURT: Insofar as the question of whether it is proper to have a separate lawsuit rather than intervention in the other lawsuit, I think a separate lawsuit is permissible, and to some degree is advantageous, rather than having it be presented in the context of a very old, long record and then trying, in the event of an appeal, at review to sift through what is needed and what is not needed.

That is not to say the Court believes that a collateral attack or even a direct attack on the consent decree is proper, but, of course, that is a matter, I take it, that is before the Court of Appeals at this time.

MR. FITZPATRICK: In *Bennett* and in *Thaggard* —

Excuse me for interrupting.

THE COURT: So, I have no problem with it being presented in the form of a separate lawsuit. It may be that a part of the problem comes from some of the reasoning that the Court used in an earlier lawsuit in which it was evaluating the significance of persons being certified and potentially being promoted where there were substantial and statistically significant differences in test score components which contributed to the rating system.

It seems to me this is one of the main problems that is here presented and which gives rise to the

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particular focus of this complaint.

Without going into all of the background of the other case, the Court's utilization of a standard error of measurement or, indeed, consideration of a standard error of difference would be as I view it merely a part of the overall process of trying to decide whether the consent decrees were being misapplied or not in the other case. My recollection is that not only was there significant difference in raw scores that the Court noted, but, indeed, that appointing authorities or those charged with responsibility for the City's decision were of the view that a particular employee was not qualified at all, so that there was

other evidence, as I recall it, dealing with that particular matter.

In this particular case, it is clear to me that the reason why Mr. Thomas has been selected is because of race, in that the chief engineer, the city engineer, has been quite candid that were race not a factor, were the consent decree not in place, another individual would have been selected by him from among the four certified to him. The evidence is that the person selected is, in his view, and indeed as shown by the test scores of tests conducted by the Personnel Board, which at least the Personnel Board believes to be content valid, qualified and competent to do the work.

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The only question, really, relates to the use for ranking purposes of various candidates where the scores of the successful applicants contribute to their ranking on the list of eligibles and, in turn, determine who would be certified by the board.

It is perhaps of some significance in that respect that the Personnel Board system and the use of tests given under state law prior to the consideration of Title Seven implications leads to problems. It is in this case shown that the person that the city engineer would have selected, but for consideration of the consent decree, was according to the test scores less qualified than persons that the city engineer would have rejected.

Obviously, the problem is that any test administered by a Personnel Board may not totally duplicate the perception of an employing agency as to who is more or less qualified. The Personnel Board system represents some compromise in the process of seeing that only qualified persons are certified, but then leaving to the employing agency flexibility within the list of those certified for ultimate selection.

The point is made there hereby, in effect, selecting a black because of his race, although the person is qualified to do the job, this has the effect of precluding all of the plaintiffs and others from the employment

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opportunities because of their race.

The Court notes that only one of the plaintiffs could have been selected and that whoever was selected would have, in a sense, curtailed the employment opportunities of all the rest. It

still follows that whoever that person would be, whether it be the person the city engineer says he would have selected or one of the others that was either certified or that has brought this suit, the fact remains that others would have been limited in their opportunities.

Very few vacancies, apparently, will come open in this job, or have been open in this job. It's a two-person job. The past persons who have held this job have all been white. The city, through its city engineer, with a black shown as qualified, has selected that black largely in recognition of the goals and objectives that are encompassed in the consent decree.

The consent decree represented a compromise between various parties, black employees, the United States, the City's Personnel Board to resolve differences as to whether blacks had over the years been discriminated against and prevented from employment opportunities because of their race. The consent decree attempts to alleviate through settlement for the results of what was perceived to have been a consequence, although not an intended consequence, of

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the examination and certification process.

I'm going to deny the request for a temporary restraining order. The ultimate question presented, however, by this obviously is an issue that is before the Court of Appeals; namely, is the consent decree fully valid and should it be recognized? I don't see an abuse of the consent decree here. The question is whether the consent decree, which has after hearing been approved, should on appeal be approved. Until there be some reversal by the Court of Appeals, I am of the view that the consent decree is valid.

In this particular case, I see no abuse of that consent decree, even though it may be that the selection of Mr. Thomas was not mandated by that decree. The application for temporary restraining order is denied.

As was noted by one of the counsel, it may well be that this does not moot this case and that there may be, subject to further development, a case at least for backpay or for preferential treatment on the next vacancy. That is a matter that I am not faced with at this point; only the question of the temporary restraining order.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

I. MOTION TO DISMISS OR ALTERNATIVELY MOTION FOR SUMMARY JUDGMENT

Defendants Richard Arrington, Jr. and the City of Birmingham move the Court to issue (i) an order dismissing the complaint or, alternatively, (ii) an order granting summary judgment in favor of these defendants on the following grounds, separately and severally assigned:

1. To the extent this action is predicated upon a claim of racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., plaintiffs have failed to satisfy the necessary statutory conditions precedent to suit. Plaintiffs, or any of them, failed to aver that charges of employment discrimination had been filed with the Equal Employment Opportunity Commission. Moreover, they failed to aver receipt of "Right to Sue" letters from the Commission authorizing commencement of an action under Title VII.

2. This action is an impermissible collateral attack on the Consent Decrees in *United States of America v. Jefferson County*, Civil Action Nos. 75-P-0666-S, 74-Z-17-S, 74-Z-12-S. To the extent plaintiffs seek to contest the implementation of these Decrees, plaintiffs' exclusive remedy is to petition the Court for relief under the Decrees.

3. To the extent this action is predicated upon the State and Local Fiscal Assistance Act of 1972, 31 U.S.C.§1221, et seq., plaintiffs have failed to satisfy the statutory conditions precedent to suit. Specifically, plaintiffs have failed to exhaust their administrative remedies as required by 31 U.S.C.§1244(a).

4. To the extent this action is predicated upon the Omnibus Crime Control and Safe Streets Act of 1968, as amended, this Court lacks jurisdiction of plaintiffs' claims on the grounds that plaintiffs are not "persons aggrieved" under 42 U.S.C.§3789d(c)(4)(A).

5. To the extent this action is predicated upon the Omnibus Crime Control and Safe Streets Act of 1968, as amended, plaintiffs have failed to satisfy the statutory conditions precedent to suit in that they have failed to exhaust their administrative remedies as required by 42 U.S.C.§3789d(c)(4)(A).

6. Plaintiffs' claims fail to state a cause of action upon which relief may be granted against these defendants.

7. This Court lacks subject matter jurisdiction of plaintiffs' complaint.

8. There are no genuine issues of material fact and these defendants are entitled to a judgment in their favor as a matter of law. Specifically, the undisputed evidence presented at the hearing on the plaintiffs' motion for a temporary restraining order shows: (a) Lucius Thomas was well qualified for the position of Civil Engineer, (b) the competing white candidates for promotion to that position were not demonstrably better qualified than Mr. Thomas, (c) the City of Birmingham has not met its long term goal for placement of blacks in positions in the Engineering Department, and (d) the promotion of Thomas to the position of Civil Engineer was in accordance with the provisions of the Consent Decrees.

WHEREFORE, defendants Richard Arrington,Jr. and the City of Birmingham request the Court to issue an order dismissing the complaint or alternatively an order granting summary judgment in favor of these defendants.

II. MOTION FOR AN AWARD OF COSTS AND ATTORNEYS' FEES

Defendants Richard Arrington, Jr. and the City of Birmingham move the Court to issue an order awarding them reasonable costs and attorneys' fees incurred in responding to the complaint on the following grounds:

1. The commencement of this action was unreasonable and vexatious.

2. Plaintiffs filed this suit in the face of a substantial body of case law establishing that they could properly obtain relief from the terms of the Consent Decrees only by filing a timely motion to intervene in *U.S. v. Jefferson County, et al.*, *Martin v. City of Birmingham*, and *Ensley Branch of the NAACP v. Seibels, et al.*

3. In *Bennett v. Arrington*, CV-82-P-0850-S, this Court previously rejected a virtually identical collateral attack to the Consent Decrees. Thus, it was clear at the outset that the maintenance of this action was without legal foundation.

4. It is clearly established in this Circuit that the granting of race conscious relief in order to eliminate the effects of past discrimination does not violate any provision of federal law.

5. Plaintiffs' [sic] knew, or should have known, that defendants did not act improperly under the Consent Decrees in connection with their action since they knew Mr. Thomas had "passed" the requisite examination and had been certified for promotion by the Jefferson County Personnel Board. Accordingly, this action was frivolously commenced and maintained.

6. An award of attorneys' fees will discourage plaintiffs and others similarly situated from commencement of additional frivolous litigation collaterally attacking the validity of the Consent Decrees.

Respectfully submitted,

/s/ James K. Baker
James K. Baker

/s/ James P. Alexander
James P. Alexander

/s/ Robert K. Spotswood
Robert K. Spotswood

Attorneys for Defendants

OF COUNSEL:

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[Certificate of Service, dated September 20, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

Motion to Dismiss or Alternatively
Motion for Summary Judgment

Defendant United States moves the Court to issue (i) an order dismissing the complaint or, alternatively, (ii) an order granting summary judgment in favor of all defendants on the following grounds:

1. This action constitutes an impermissible collateral attack on the lawfully entered Consent Decrees in *United States, et al.* v. *Jefferson County, et. al.*, Civil Action Nos. 75-P-0666-S, 74-P-0017-S, 74-P-0012-S, and it should therefore be dismissed for lack of subject matter jurisdiction in accordance with the recent decision of the Court of Appeals for the Eleventh Circuit in *Thaggard* v. *City of Jackson*, ____ F.2d ____ (11th Cir. Slip Opinion, September 27, 1982).

2. The ruling in *Thaggard* likewise requires the dismissal of the plaintiffs' complaint insofar as it alleges that the defendants City of Birmingham and Jefferson County Personnel Board are failing properly to implement the Consent Decrees. Such an allegation may only be brought before this Court by the plaintiffs following an application by them for permissive intervention to enforce the Consent Decrees in *United States, et al.* v. *Jefferson County, et al.*, consolidated actions, wherein the Court expressly retained jurisdiction over those actions to

ensure that the parties properly comply with the terms of the Consent Decrees.

3. To the extent plaintiffs' complaint is predicated upon a claim of racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, plaintiffs have failed to satisfy the necessary statutory conditions precedent to suit. Plaintiffs do not aver that charges of employment discrimination had been filed with the Equal Employment Opportunity Commission and they failed to aver receipt of "Right to Sue" letters from the EEOC, or other appropriate authority, authorizing commencement of an action under Title VII.

4. To the extent plaintiffs' complaint is predicated upon the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §1221, *et seq.*, and the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. §§3766 *et seq.*, plaintiffs have failed to satisfy the statutory conditions precedent to suit under either of these statutes by first filing charges of discrimination with the administrative agencies authorized to investigate such charges, as required by 31 U.S.C. §1244(a) and 42 U.S.C. §§3789d(c)(4)(A).

5. Plaintiffs' complaint fails to state a cause of action upon which relief may be granted.

WHEREFORE, the defendant United States requests the Court to issue an order dismissing the complaint or, alternatively, granting summary judgment in favor of the defendants.

Respectfully submitted,

/s/ Richard J. Ritter
Richard J. Ritter
Attorney
Civil Rights Division
U. S. Department of Justice
Washington, D.C. 20530

[Certificate of Service, dated October 13, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

MOTION OF DEFENDANT-INTERVENORS TO DISMISS AND FOR ALLOWANCE OF COSTS

Defendant-intervenors John W. Martin, et al., move to dismiss the complaint upon the ground it fails to state a claim.

Defendant-intervenors ask that the plaintiffs be ordered to pay the defendant-intervenors their reasonable costs, including attorney's fees, for their defense of this action, upon the ground that plaintiffs' suit is frivolous and vexatious.

Respectfully submitted,

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Counsel for defendant-intervenors
John W. Martin, et al.

Dated: October 22, 1982

[Certificate of Service and memorandum omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, an unincorporated labor association, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 82-P-1852-S

MOTION TO CONSOLIDATE

Plaintiffs move the Court to consolidate this action with the post-judgment actions pending in this Court styled *U.S.A. v. Jefferson County, et al.*, CV-75-P-0666-S, and related cases CV-74-Z-012-S, and CV-74-Z-017-S, for that:

1. These cases involve common questions of law and fact concerning the proper means by which the consent decrees are due to be implemented and whether the named plaintiffs were discriminated against on the basis of race in the particular incident made the basis of this suit.

2. Consolidation would further a more economical resolution of the issues in this case and those raised through the post-judgment Complaint in Intervention in *U.S.A. v. Jefferson County, et al.*

/s/ Raymond P. Fitzpatrick, Jr.
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[Certificate of Service, dated August 4, 1983, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS; CARLICE E. PAYNE and RONNIE J. CHAMBERS,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; RODERICK BEDDOW, JR., HENRY P. JOHNSTON and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; and JEFFERSON COUNTY PERSONNEL BOARD,

Defendants.

CIVIL ACTION NO.
CV 83-AR-2116-S

COMPLAINT

(1) This Court has jurisdiction of this action under 28 U.S.C. § 1343, 28 U.S.C. § 2201, 42 U.S.C. §§ 1981 and 1983, Title VII of the Civil Rights Act of 1964 and the Fifth and Fourteenth Amendments to the Constitution of the United States.

(2) Plaintiffs are all residents of Jefferson County, Alabama, and are over the age of twenty-one years.

(3) Defendant City of Birmingham is a political subdivision of the State of Alabama and an employer within the meaning of 42 U.S.C. 2000e(b).

(4) Defendant Richard Arrington, Jr., is Mayor of the City of Birmingham and is responsible for the administration and operation of the city government of Birmingham, including the hiring, assigning and promoting of employees of the City.

(5) Defendant Jefferson County Personnel Board is an agency of Jefferson County established pursuant to the laws of the State of Alabama (Act No. 248 of the 1945 Alabama Legislature, as amended, hereinafter referred to as the "Enabling Act"), is an employer within the meaning of 42 U.S.C. 2000e(b), as amended, and is engaged in the procuring and screening of applicants and certification of eligibles for appointment with defendants named in paragraphs (3) and (4) and in the administration of a civil service system for such defendants.

(6) Defendants Roderick Beddow, Jr., Henry P. Johnston and Hiram Y. McKinney are members of the Jefferson County Personnel Board, and as such they are responsible for its administration and operation, including the procuring and reviewing of applicants and certification of eligibles for appointment with defendants named in paragraphs (3) and (4).

(7) The defendant City of Birmingham is a recipient of revenue-sharing allocations from the United States Treasury pursuant to the provisions of the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221, *et seq.*), and a recipient of funds from the United States Department of Justice pursuant to the Omnibus Crime Control and Safe Street Act of 1968, as amended (42 U.S.C. 3701, *et seq.*).

(8) Plaintiffs are all white, male firefighter employees of the City of Birmingham. Pursuant to the provisions of the Personnel Board Enabling Act, the plaintiffs all have applied for, and taken the examination for, promotion to the classification of Fire Lieutenant of the Birmingham Fire Department. In partial discharge of their obligations under the Civil Service Act, the Personnel Board defendants, through their Director and other employees, ranked the persons who passed the Fire Lieutenant examination and were otherwise eligible for promotion under the provisions of the Civil Service Act. The plaintiffs are among the top-ranked candidates of the persons listed on the Register of Eligibles prepared pursuant to the January, 1982, Fire Lieutenant examination and the March, 1983, Fire Lieutenant examination.

(9) The City of Birmingham and Mayor Arrington have failed to promote plaintiffs Wilks and Chambers to the clas-

sification of Fire Lieutenant because of their race (white). The City intentionally promoted blacks on the basis of their race.

(10) The City of Birmingham and Mayor Arrington delayed promoting plaintiff Payne to the classification of Fire Lieutenant because of his race (white). Payne's promotion was delayed for several months because of his race.

(11) The Personnel Board defendants have illegally certified for promotion to the City of Birmingham and Arrington black persons who were in fact promoted to the classification of Fire Lieutenant on the basis of their race instead of the plaintiffs being so promoted.

(12) The defendants City of Birmingham and Arrington are following a policy of hiring and promoting their employees on the basis of race or color with black employees being employed, hired and promoted on the basis of their race in accord with numerical quotas, rather than purely upon merit and superior qualifications, all constituting illegal and unconstitutional discriminations against whites in hiring and employment practices. The black persons promoted instead of the plaintiffs were less qualified to perform the duties of a Fire Lieutenant than plaintiffs.

(13) The Personnel Board, its members and its Director are certifying candidates for hiring and promotion to the appointing authority on the basis of race, favoring blacks to the deference [sic] of whites, rather than in a color-blind fashion and solely on the basis of merit, competition and superior qualifications.

(14) The defendants' acts and practices described in the foregoing paragraphs constitute a pattern and practice of resistance to the full enjoyment of the rights of whites, and plaintiffs in particular, to equal employment opportunities within their jurisdictions and under their supervision and control. This pattern and practice is of such a nature and is intended to deny the full exercise of rights secured by Title VII of the Civil Rights Act of 1964, as amended, and is in violation of the obligations imposed by the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and the State and Local Fiscal Assistance Act of 1972, as well as rights guaranteed by the

Fifth and Fourteenth Amendments to the Constitution of the United States and by 42 U.S.C. §§ 1981 and 1983. Unless restrained by order of this Court, the defendants will continue to pursue policies and practices the same as or similar to those alleged in this Complaint.

(15) Plaintiffs have received Right to Sue letters from the Equal Employment Opportunity Commission.

WHEREFORE, plaintiffs pray that defendants, their officials, agents, employees and all persons in active concert or participation with them be preliminarily and permanently enjoined from engaging in any discriminatory practice based on race or sex, and specifically from:

(a) Failing or refusing to recruit, hire, assign and promote white applicants and employees on an equal basis with black applicants and employees;

(b) Failing or refusing to recruit, hire, assign and promote male applicants and employees on an equal basis with female applicants and employees;

(c) Failing or refusing to eliminate qualifications and other selection standards which have not been shown to be job-related and which disproportionately exclude whites and males;

(d) Failing to certify plaintiffs as eligible candidates for promotion to Fire Lieutenant;

(e) Failing to strictly follow the certification and appointment provisions of the said Civil Service Act;

(f) Enforcing or complying with race-conscious promotional quotas.

Plaintiffs further pray that this Court will enter its declaratory judgment governing the rights, status and obligations of the parties. Plaintiffs further pray that this Court will enter its declaratory judgment concerning the legality and validity of the actions of defendants as described in this Complaint, and for such other related declaratory relief to which plaintiffs may be entitled.

Plaintiffs further pray for back pay, retroactive seniority, immediate certification and promotion, monetary and punitive damages, a reasonable attorney's fee for their counsel of record, and court costs.

Plaintiffs pray for such other alternative or general relief as to which they may be entitled.

/s/ Raymond P. Fitzpatrick, Jr.
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SERVE DEFENDANTS AT:

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MEMBERS OF JEFFERSON COUNTY PERSONNEL BOARD and JEFFERSON COUNTY PERSONNEL BOARD
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[Certificate of Service, dated September 7, 1983, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

ANSWER

For answer to the complaint herein, defendants Richard Arrington, Jr. and the City of Birmingham say as follows:

FIRST DEFENSE

The complaint fails to state a claim against these defendants upon which relief may be granted.

SECOND DEFENSE

Plaintiffs have failed to join parties in whose absence complete relief cannot be accorded.

THIRD DEFENSE

The complaint herein constitutes an impermissible collateral attack upon Consent Decrees entered by the United States District Court for the Northern District of Alabama in civil actions numbered 75-P-0666-S, 74-P-0012-S and 74-P-0017-S.

FOURTH DEFENSE

To the extent this action is predicated upon Title VII, it fails to state a claim in that it challenges promotion procedures established by a Consent Decree which procedures and decisions pursuant thereto are expressly protected from dis-

ciminatory [sic] challenge under Title VII, as interpreted by the Equal Employment Opportunity Commission.

FIFTH DEFENSE

This action is barred by laches.

SIXTH DEFENSE

For further answer to the complaint herein defendants Arrington and the City of Birmingham says as follows with respect to each paragraph of the complaint:

1. These defendants deny the allegations of paragraph 1 of the complaint.

2. These defendants admit the allegations of paragraph 2 of the complaint.

3. These defendants admit the allegations of paragraphs 3 and 4 of the complaint.

5. These defendants admit the allegations of paragraph 5 of the complaint, paragraph 6 of the complaint, as amended, and paragraph 7 of the complaint.

8. These defendants admit the allegations of paragraph 8 of the compliant.

9. These defendants deny the allegations of paragraphs 9, 10, 11, 12, 13 and 14 of the complaint.

15. With respect to the allegations of paragraph 15 of the complaint, these defendants are without sufficient knowledge, information or belief to form a judgment as to the truth or accuracy thereof and, accordingly, deny those allegations.

16. Except as herein expressly admitted, these defendants deny the allegations of the complaint.

17. The defendants deny that plaintiffs are entitled to any relief whatsoever.

WHEREFORE, these defendants demand a judgment be entered in their behalf and that they be awarded costs and

attorney's fees in defense of this frivolous and unfounded complaints [sic].

/s/ James K. Baker
James K. Baker

/s/ James P. Alexander
James P. Alexander
Attorneys for Defendants
Arrington and the City of
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OF COUNSEL:

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[Certificate of Service, dated September 28, 1983, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

MOTION TO REASSIGN

Defendants Richard Arrington, Jr. and the City of Birmingham move the Court to reassign this case from The Honorable William Acker, United States District Judge, to The Honorable Sam C. Pointer, Jr. United States District Judge in order to avoid the possibility of conflict and inconsistent interpretation of Consent Decrees. As grounds for reassignment, these defendants show the Court as follows:

1. The complaint herein, on statutory and Constitutional grounds, challenges referral practices of the Jefferson County Personnel Board and the promotion practices of the defendant City of Birmingham. These practices are the subject of existing Consent Decree in force and effect in this Court.

2. Defendants City of Birmingham and Jefferson County Personnel Board entered into companion consent decrees in August 1981 in civil actions numbered 75-P-0666-S, 74-P-0012-S and 74-P-0017-S. The consent decrees govern both referral and selection decisions in substantial part.

3. Judge Pointer has retained jurisdiction over these decrees and has routinely and regularly been involved in construing those decrees and resolving specific challenges to implementation decisions. Judge Pointer is presiding over related litigation. *BACE, et al.* v. *Arrington, et al.*, CV 82-P-1852-S; *Garner, et al.* v. *City of Birmingham*, CV 82-P-1461-S; *Bennett* v. *Arrington*, CV-P-0850-S.

4. Although the instant lawsuit does not specifically reference the decrees, it is one of a number of challenges filed by the employee associations, and their counsel.

WHEREFORE, in order to avoid the possibility of conflicting or inconsistent interpretations to the decrees, the defendant City of Birmingham and Richard Arrington, Jr. move that this case be reassigned.

/s/ James K. Baker
James K. Baker

/s/ James P. Alexander
James P. Alexander

Attorneys for Defendants
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the City of Birmingham

OF COUNSEL:

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[Certificate of Service, dated September 28, 1983, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*,
Plaintiffs,
v.
RICHARD ARRINGTON, JR., *et al.*,
Defendants.

CIVIL ACTION NO.
CV 83-AR-2116-S

ORDER

The judge of this Court to whom this case has routinely been assigned is unaware of any rule which would permit him to reassign a case to another judge of the Court, much less to a particular judge requested by a party. Therefore, finding the motion to reassign filed by certain defendants not well taken, the said motion is hereby DENIED.

If at a later time the undersigned determines that any consent decree entered by another judge of this Court is controlling and requires interpretation, the undersigned will face the issue at that time.

DONE this 30th day of September, 1983.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*,
Plaintiffs,
v.
RICHARD ARRINGTON, JR., *et al.*,
Defendants.

CIVIL ACTION NO.
CV 83-AR-2116-S

ANSWER

Come now the defendants, Hiram Y. McKinney, James B. Johnson, and Roderick Beddow, Jr., and the Personnel Board of Jefferson County (the above-named defendants will be collectively referred to hereafter as the "Board") and answer the identically numbered paragraphs of plaintiffs' complaint as follows:

1. The Board admits that this Court has jurisdiction over this case under the stated statutory sections, but denies that it has taken any actions that violate any of plaintiffs' rights.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. The Board admits that Hiram Y. McKinney, James B. Johnson, and Roderick Beddow, Jr., are members of the Personnel Board of Jefferson County, and as such, they are responsible generally for its administration and operation, including the procuring and reviewing of applicants and certification of eligibles for appointment with defendants named in paragraphs (3) and (4).

7. The Board relies upon the answers of the defendant City of Birmingham in regard to this averment.

8. Admitted.

9. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

10. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

11. Denied.

12. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

13. The Board entered into a Consent Decree which was approved by the United States District Court for the Northern District of Alabama, Southern Division, in Case No. CV-75-P-0666-S, and has made race conscious certifications pursuant to this Consent Decree, as is required by the Consent Decree. As such, qualifications are now no longer made "solely on the basis of merit, competition and superior qualifications." If these actions by the Board are deemed to be favoring blacks to the detriment of whites then the Board admits the averments of paragraph 13 of the complaint. Otherwise, the Board denies the averments of Paragraph 13.

14. The Board admits that it will continue to pursue the policies and practices in accordance with the Personnel Board's Enabling Act and Consent Decree. The Board denies the remaining averments of this paragraph.

15. The Board is without sufficient knowledge to admit or deny the averments of this paragraph. The Board denies that the plaintiffs are entitled to any relief against the Board.

DEFENSES

16. All of the actions taken by the Board concerning the above-referenced averments were taken pursuant to and in accordance with the Consent Decree entered by the United States District Court for the Northern District of Alabama, Case

No. CV-75-P-0666-S, and related cases, and therefore the Board is not liable for any acts complained of therein.

17. This complaint is barred by the doctrine of collateral estoppel.

18. This complaint is barred by the doctrine of res judicata.

19. All of the actions referred to above that were taken by the Board were taken in full conformity with all applicable constitutional provisions, statutes, laws, regulations, and court orders and decrees.

20. All of the Board's actions were made in accordance with the validly approved Consent Decree. Since all of the Board's actions were taken in accord with the validly approved Consent Decree, the Board is immune from liability for its actions made pursuant thereto. As the Consent Decree permits and requires race conscious selection procedures and practices, the Board is immune from liability even though it uses race conscious selection procedures and practices.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

Attorneys for Defendants, the
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[Certificate of Service, dated October 18, 1983, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

MOTION TO CONSOLIDATE

Defendants Richard Arrington, Jr. and the City of Birmingham move the Court to consolidate the case of *Wilks, et al v. Arrington, et al.*, Civil Action No. CV-83-AR-2116-S with the pending cases of *United States of America v. Jefferson County*, Civil Action Nos. CV-75-P-0666-S, et al. As grounds therefor, defendants City of Birmingham and Arrington show the Court as follows:

1. The defendant City of Birmingham has entered into a consent decree in *U.S. v. Jefferson County, supra*, and the Court in *U.S. v. Jefferson County* retains jurisdiction over that decree, as well as a companion decree with the Jefferson County Personnel Board, and has routinely construed those decrees, resolved specific challenges by third parties to implementation decisions, and resolved disputes among the parties. Judge Pointer is presiding over the consent decrees as well as related litigation which, like this case, attacks race and gender conscious relief. *BACE, et al. v. Arrington, et al.*, CV 82-P-1852-S; *Garner, et al. v. City of Birmingham*, CV 82-P-1461-S; *Bennett v. Arrington*, CV P-0850-S.

2. The plaintiffs' complaint, as amended, challenges hiring and promotion in accord with "numerical quotas". Plaintiffs also challenge race and gender-conscious certification by the local civil service board. Both the adoption of quotas and the special referral provisions are part of the relief afforded by the consent decrees in case No. 75-P-0666-S, 74-P-0017-S and 74-P-0012-S.

3. The consent decree with the City of Birmingham in Case Nos. 75-P-0666-S, et al. provides in part:

> Compliance with the terms and conditions of this Consent Decree shall constitute compliance by the City with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §1981 and §1983, and the Fourteenth Amendment to the Constitution of the United States as raised by the plaintiffs' complaints. . . . (Para. 54)

It further provides:

> Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree shall not be deemed discriminatory within the meaning of paragraph 1 above or the provisions of 42 U.S.C. 2000e-2(h)(J). . . . (Para. 3)

Accordingly, any ruling on the relief sought herein necessarily must involve construction of these and, perhaps, other provisions in Consent Decree.

4. By this action, plaintiffs seek to reform, modify, set aside or otherwise impair relief agreed to by the parties and approved by the Court in Case Nos. 75-P-0666-S, et al. That is, the relief which they seek necessarily conflicts with the existing orders of this Court in other cases. See Prayer for Relief paragraphs (e) and (f).

5. Consolidation would achieve economy of judicial effort and avoid the possibility of two conflicting findings and legal determination by two judges. See *Blair v. City of Greenville*, 649 F.2d 365 (5th Cir. 1981); *Compania Espanola de Pet., S.A. v. Nereus Ship.*, 527 F.2d 966 (2nd Cir. 1975), *cert. denied*, 426 U.S. 936 (1976).

6. Consolidation would avoid unnecessary expense, delay and duplication. See 9 C. Wright & A. Miller, *Federal Practice and Procedure*: Civic § 2383 at 259 (1979), *Bolling v. Miss. Paper Co.*, 86 F.R.D. 6 (N.D. Ms. 1979); *Grimes v. KECO*, 22 F.E.P. Cases 484 (S.D. Ohio 1976). Cf. *King v. Ralston Purina Co.*, 31 F.E.P. Cases 373 (W.D.N.C. 1983); *King v. Pepsi-Cola Metropolitan Bottling Co.*, 86 F.R.D. 4 (E.D. Pa. 1979).

7. This action involves a common question of law and closely related facts with Case Nos. 75-P-0666-S, et al. See, *Blair v. City of Greenville, supra*; *Nettles v. General Accident Fire & Life Assur. Corp.*, 234 F.2d 243 (5th Cir. 1956); *Kershaw v. Sterling Drug., Inc.*, 415 F.2d 1009 (5th Cir. 1969); *Compania Espanola de Pet., S.A. v. Nereus Ship., supra*. The City of Birmingham has expressly relied upon the provisions of the Consent Decree in making the decisions challenged in this case.

8. None of the factors requiring denial of consolidation is present; consolidation is typically denied where no common question of law or fact is involved; if the parties would not be adequately protected; if consolidation would lead to confusion and prejudice or where consolidation would not effect any appreciable saving of time or expense. See 5 *Moore's Fed. Practice*, Para. 42.02[3] at pp. 42-22 through 42-45 and cases cited therein; *Molever v. Levenson*, 539 F.2d 996 (4th Cir. 1976).

WHEREFORE, in order to avoid the possibility of conflicting or inconsistent interpretation to the decrees, the defendants City of Birmingham and Arrington pray that the Court enter an Order consolidating this case with Civil Action Nos. 75-P-0666-S, et al.

Respectfully submitted,

/s/ James K. Baker
James K. Baker

/s/ James P. Alexander
James P. Alexander

Attorneys for Defendant
City of Birmingham

OF COUNSEL:

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[Certificate of Service, dated October 27, 1983, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*,
Plaintiffs,
v.
RICHARD ARRINGTON, JR., *et al.*,
Defendants.

CIVIL ACTION NO.
CV 83-AR-2116-S

PLAINTIFF'S OPPOSITION TO MOTION TO CONSOLIDATE

Plaintiffs hereby state the following in Opposition to the Motion to Consolidate:

(1) Plaintiffs, or their privies, have yet to be able to obtain full party status in *U.S.A.* vs. *Jefferson County, et al.* CV-75-666-S, and related cases 74-Z-012-S, and 74-Z-017-S, which the defendants now seek to consolidate this case with. It is indeed incredible that the defendants have continually asserted that non-minority employees have no standing in *U.S.A.* vs. *Jefferson County*, yet now seek to consolidate these two cases.

(2) This action will not require any interpretation of any consent decree entered in any other case. Neither plaintiffs, nor their privies, were parties to the consent decrees in *U.S.A.* vs. *Jefferson County*. The fact that the defendants have plead [sic] the prior judgment as a defense in this case does not mitigate in favor of a consolidation.

(3) There are no common questions of law or fact to be determined in *U.S.A.* vs. *Jefferson County*. There are no active trial proceedings taking place in that case at this time.

(4) At issue in this case are simple yet important questions of whether the defendants have violated the civil rights of

these plaintiffs. If these defendants are pleading a prior judgment as a defense, then any Judge of this Court is fully capable of determining the validity of such a defense.

(5) Because neither plaintiffs, nor their privies, are parties to the Consent Decrees entered in *U.S.A.* vs. *Jefferson County* upon which these defendants rely, said decrees are not enforceable against these plaintiffs and are not in need of any construction in this case. *See, W. R. Grace & Co.* vs. *Local Union 759*,____ U.S.____, 51 U.S.L.W. 4643 (May 31, 1983); and *E.E.O.C.* vs. *Safeway Stores, Inc.*,____F.2d ___, 32 EPD ¶33,815 (5th Cir. Sept. 16, 1983).

(6) This action is not a collateral attack on any prior judgment.

(7) Consolidation would unnecessarily delay and frustrate an economical and swift adjudication of plaintiffs' claims.

(8) The moving defendants have failed to file the Motion to Consolidate in *U.S.A.* vs. *Jefferson County*, CV-75-P-0666-S.

(9) No other Judge of this Court has consolidated any prior litigation challenging employment practices of any *U.S.A.* vs. *Jefferson County, et al.*, Consent Decree party with said case.

(10) A consolidation will not save judicial resources nor avoid overlapping trials of duplicative proof.

WHEREFORE, plaintiffs respectively urge the Court to deny the Motion to Consolidate and deny any further actions to transfer this case.

/s/ Raymond P. Fitzpatrick, Jr.
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[Certificate of Service, dated October 31, 1983, omitted]

NOS. 81-7761, 82-7129

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFERSON COUNTY, *et al.*,

Defendants-Appellees.

JOHN W. MARTIN, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF BIRMINGHAM, *et al.*,

Defendants-Appellees.

ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*,

Plaintiffs-Appellees,

v.

GEORGE SEIBELS, *et al.*,

Defendants-Appellees.

BIRMINGHAM FIREFIGHTERS ASSOCIATION 117,

Proposed Intervenor- Appellant.

JAMES A. BENNETT, *et al.*,

Plaintiffs-Appellants,

v.

RICHARD ARRINGTON, JR., *etc.*, *et al.*,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Dec. 12, 1983.

Rehearing and Rehearing En Banc
Denied Jan. 20, 1984.

Appeals from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, FAY and ANDERSON, Circuit Judges.

TJOFLAT, Circuit Judge:

In January 1974 the Ensley Branch of the NAACP[1] and John Martin[2] each filed a separate class action complaint in the district court against the Jefferson County, Alabama, Personnel Board (Board) and the City of Birmingham, Alabama (City). They alleged that the Board and the City violated, inter alia, Title VII of the Civil Rights Act[3] through racially discriminatory hiring and promotion in various public service jobs, including firefighters.[4] In May 1975, the United States

1. The Ensley Branch of the NAACP is a membership organization of black citizens of Birmingham, Alabama. It, along with three black males who had applied for positions with the City of Birmingham, Alabama, and taken tests administered by the Jefferson County, Alabama, Personnel Board, filed a class action complaint against the City, George Seibels, Jr., then Mayor of Birmingham, the Board, the three members of the Board and the director of the Board. Of these parties, only the plaintiffs, the City, the Mayor (now Richard Arrington), and the Board are parties in this appeal. *See infra* notes 7 & 8.

2. John Martin is a black male who applied for a position with the City of Birmingham and was certified by the Jefferson County Personnel Board but rejected by the City. He and six other black applicants for employment with the City, or City employees denied promotion, filed a class action against the defendants named in the suit brought by the Ensley Branch of the NAACP, and three Jefferson County Commissioners who plaintiffs alleged were responsible for Board activities. Only the plaintiffs, the City, the Mayor, and the Board are parties in this appeal. *See infra* notes 7 & 8.

3. The plaintiffs alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2000e-17 (1976 & Supp. V 1981), as amended by the Equal Employment Opportunity Act of 1972 (Pub.L. 92-261, March 24, 1972); 42 U.S.C. § 1981 (1976), providing for equal rights for all persons within the United States to make contracts; 42 U.S.C. § 1983 (1976 & Supp. V 1981), to redress deprivation under color of law of rights, privileges and immunities secured by the equal protection clause of the fourteenth amendment.

4. The Board and the City share responsibility for public sector hiring in the City in the following manner. The Board administers examinations to applicants for classified City employee positions, adopts rules and

also filed a complaint in the district court alleging similar discrimination against blacks and women by the Board and the City.[5]

These three cases were consolidated for discovery and trial purposes. In December 1976, the district court held a bench trial limited to the issue of the validity of the written tests used by the Board and the City to screen police and firefighter applicants. The court found that the tests had a severe adverse impact on black applicants and concluded that the tests therefore violated Title VII. The court directed entry of final judgment for the plaintiffs on this issue, pursuant to Fed.R.Civ.P. 54(b), and the defendants appealed. While their appeal was pending, the district court tried the remaining claims pending against the Board only.

After we ruled on the district court's decision concerning the written tests, *Ensley Branch of NAACP v. Seibels*, 616 F.2d 812 (5th Cir.) *cert. denied sub nom. Personnel Board v. United States*, 449 U.S. 1061, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980),[6] the plaintiffs, in all three cases, entered into extensive negotiations with the Board and the City which culminated in two proposed consent decrees, one with the Board[7] and one with the City.[8] The former disposed of all of the plaintiffs' claims

regulations governing the operation of the civil service system, and administers the system in Jefferson County. The Board certifies to the appointing authority, the City, the names of three eligible applicants for an open position. The City then chooses an employee. Classified positions include all full-time City jobs except common laborers, judicial officers, elected officials, and a few executive positions.

5. The United States in its suit added to the claims stated in the other cases violations of the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 1221 (1976), and Omnibus Crime Control and Safe Streets Act of 1968, as amended, former 42 U.S.C. § 3766(c)(1) (1976).

6. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

7. The Board was the only defendant executing the consent decree. The plaintiffs abandoned their claims against the other county defendants. *See supra* notes 1 and 2.

8. The City was the only defendant executing the consent decree although the Mayor was referred to in the decree as a party to the settlement.

against the Board; the latter disposed of all the plaintiffs' claims against the City. The two consent decrees incorporated some affirmative action remedies in hiring and promotional policies.[9]

The court provisionally approved these consent decrees in June 1981, but reserved final approval until it convened a fairness hearing to consider the objections of all interested parties. The court held that hearing in August 1981, at which it considered, among others, the objections filed by the Birmingham Firefighters Association 117 (BFA),[10] as amicus curiae. The day after the hearing, BFA and two of its members (BFA members) moved, pursuant to Fed.R.Civ.P. 24(a), to intervene of right in each of the three cases, contending that the proposed consent decrees would have a substantial adverse impact upon them. The court denied their motions as untimely, and approved, and entered, both consent decrees.

Seven individual white male firefighters (Firefighters) then filed a complaint in the district court against the Board and the City[11] to enjoin the enforcement of the consent decrees on the ground that the operation of the decrees would discriminate against them in violation of Title VII of the Civil Rights Act. They applied for a preliminary injunction, which, after a hearing, the district court denied.

The BFA members and the Firefighters then appealed from the court's denials of the motion to intervene and the

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9. The consent decrees set forth an extensive scheme of remedies: injunctions against further discrimination on the basis of race or sex and against retaliatory measures by the defendants against members of the plaintiff classes; goals for the recruitment and hiring of blacks and women to correct the effects of past discrimination; and some awards of back pay to class members allegedly discriminated against during a several year period prior to the entry of the decrees.

10. The Birmingham Firefighters Association 117 is a labor association of firefighters employed by the City. It represents the interests of the majority of the City-employed firefighters and negotiates on their behalf with the City.

11. The white male firefighters, none of whom were in the BFA members group, also named as defendants Richard Arrington, Mayor of the City, the members of the Board, and the Director of the Board. None of these additional defendants are parties in this appeal.

preliminary injunction. We note provisional jurisdiction to review the denial of the motion to intervene, under our "anomalous rule";[12] if we find the motion to have been properly denied, we must dismiss for lack of jurisdiction. We note jurisdiction, pursuant to 28 U.S.C. § 1292(a)(1) (1976), to review the denial of the preliminary injunction.

I.

The district court denied the BFA members' motion to intervene on the ground that it was untimely filed. The question of timeliness is largely committed to the district court's discretion; therefore, we review the court's action only for an abuse of discretion. *Howse v. S/V "Canada Goose I"*, 641 F.2d 317, 320 (5th Cir. Unit B 1981); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977).

A district court must consider four factors in assessing timeliness, namely (1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew

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12. *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977) sets forth our rule:

> Under this circuit's "anomalous rule",[7] governing the appealability of orders denying intervention, we have provisional jurisdiction to determine whether the district court erroneously concluded that the appellants were not entitled to intervene of right under section (a) of Rule 24, or clearly abused its discretion in denying their application for permissive intervention under section (b) of Rule 24. If we find that the district court's disposition of the petitions was correct, or within the ambit of its discretion, then our jurisdiction evaporates because the proper denial of leave to intervene is not a final decision, and we must dismiss these appeals for want of jurisdiction. But if we find that the district court was mistaken or clearly abused its discretion, then we retain jurisdiction and must reverse. In either event, we are authorized to decide whether the petitions for leave to intervene were properly denied.

(Citations omitted.) Footnote 7 in the above statement cites criticism of this rule, advocating a simple review of the denial of intervention as a final order. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1923 (1972).

or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his petition is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely. *Stallworth*, 558 F.2d at 264-66. This analysis applies whether intervention of right or permissive intervention under Fed.R.Civ.P. 24 is claimed. *Id.*, citing *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 387, 97 S.Ct. 2464, 2466, 53 L.Ed.2d 423 (1977); *NAACP v. New York*, 413 U.S. 345, 366, 93 S.Ct. 2591, 2602-03, 37 L.Ed.2d 648 (1973); *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 1115 (5th Cir.1970).

Under the first factor of the timeliness test, the district court correctly concluded that the BFA members did not act seasonably. The BFA members contend that their motion was timely because they filed it just as soon as they discovered that they might be adversely affected by a final adjudication of the plaintiffs' claims in these cases. It is true, as we said in *Stallworth*, that mere knowledge of the pendency of an action, without appreciation of the potential adverse effect an adjudication of that action might have on one's interests, does not preclude intervention. The BFA members, however, knew at an early stage in the proceedings that their rights could be adversely affected, as was evidenced by their conversations with the City regarding the tactics the City should take in defending the action; yet they failed to seek intervention.

The BFA members contend that their failure to move to intervene was justified, and therefore should have been excused, because they were entitled to assume that the City and the Board would protect their interests. There are, of course, certain circumstances under which one is entitled to assume that a party will protect one's interests. The Supreme Court made this clear in *United Airlines*, which the BFA members argue controls this case. There, a stewardess filed a class action contesting a no-marriage rule that United applied only to female employees. The district court refused to certify a class, and the stewardess failed to appeal. Another stewardess moved the district court for leave to intervene in order to file the appeal. The district court denied her motion, and she appealed from that denial. The Court of Appeals reversed, with instructions to

permit intervention on remand, and the Supreme Court affirmed. The Supreme Court justified the failure of the second stewardess to move to intervene earlier because "as soon as it became clear to [her] that the interests of the unnamed class members would no longer be protected by the named class representative, she promptly moved to intervene . . . ." *Id.* 432 U.S. at 394, 97 S.Ct. at 2470. The Court thus recognized that the second stewardess had the right to rely on the first to represent her.

The BFA members had no identity of interest with the City in the way that the unnamed class member shared an interest with the named class representative in *United Airlines*. From the beginning, the Board and the City represented a wide range of occupations in the public sector and had different cost-benefit settlement interests, and incentives, from those of the BFA members. Thus, the mere fact that the Board and the City made a settlement allegedly adverse to the interests of BFA members does not mean that they "changed their position and became adverse" as the BFA members alleged in their motion to intervene. Rather, it underscores the variance in interest that existed when the litigation commenced. BFA members, having made an apparently ill-advised decision to rely on others to advance their interests, knowing that they could be adversely affected, cannot now be heard to complain.

Under the second factor of the timeliness test, the district court was required to consider "how much prejudice would result [to the existing parties] from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case." *Stallworth*, 558 F.2d at 267. The BFA members knew of their interest in these cases prior to the first trial. They could have moved to intervene then, but chose to wait until after two trials and a long complex negotiation process had taken place. The court's grant of their motion to intervene would plainly have prejudiced the existing parties, since it would have nullified these negotiations with the Board and allowed a pattern of past discriminatory practices to continue.

The third factor of the test required the court to consider whether the BFA members would be prejudiced if denied inter-

vention. Prejudice, as the term is used in this context, originally referred to a consideration of whether the would-be intervenor sought intervention under Fed.R.Civ.P. 24(a) (intervention of right) or rule 24(b) (permissive intervention). *Stallworth*, 558 F.2d at 265, 266. Rule 24(a) expresses a concern for the extent to which a nonparty risks his interest in the property or transaction involved in the action unless his interest is adequately represented by existing parties. Rule 24(b) expresses a similar concern where the nonparty may have a common question of law or fact determined to his disadvantage. *Stallworth* expands the rule 24(a) or rule 24(b) inquiry to allow "varying degrees of harm among intervenors of the same type to be taken under consideration." 558 F.2d at 266. However, the discussion in *Stallworth* still indicates that the thrust of the inquiry must be the extent to which a final judgment in the case may bind the movant even though he is not adequately represented by an existing party. We note that this third factor thus has weight only in the situation where (a) the judge cannot anticipate the extent to which a final judgment will bind the movant, or (b) the judge finds that although the movant has an identical interest with a party, he has a sufficiently greater stake than the party that the party's representation may be inadequate to protect the movant's interest. Otherwise, where the movant has no identity of interest with a party and thus could not be bound, or where his interest is identical with a party and consequently he is adequately represented, we would find no prejudice sufficient to give weight to the third factor.[13]

We therefore proceed to consider the extent to which it appeared to the district court that the BFA members might be bound by the consent decrees in these cases. We have not yet been called upon to rule on the preclusive effect a consent decree in a Title VII case might have on one subsequently claim-

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13. The burdens of cost and delay the would-be intervenor would suffer if required to bring a future lawsuit do not constitute prejudice under the third *Stallworth* factor. He would have those burdens at any time he sought to enforce his rights in court. He is merely getting a free ride if the court allows intervention. Naturally, the court can order the intervenor to pay his share of costs if it grants the motion so the financial "gain" of intervening is by no means certain.

ing reverse discrimination.[14] Other circuits have faced the issue,[15] but the results of these cases are sufficiently unclear to warrant careful discussion here.

The principles of res judicata and collateral estoppel apply to consent decrees as well as to ordinary judgments entered by a court.[16] These doctrines prevent the attack of a prior judgment by parties to the proceedings or by those with sufficient identity of interests with such parties that their interests are deemed to have been litigated in those proceedings. A final judgment may not, however, bind a nonparty when his interests were not represented; thus, situations can arise where a judgment purporting to affect a nonparty must not be applied to him. There are, additionally, limitations on the extent to which a nonparty can undermine a prior judgment. A nonparty may not reopen the case and relitigate the merits anew; neither may he destroy the validity of the judgment between the parties.

In applying these principles to consent decrees, some courts have raised a specter that any action having a burden, financial or otherwise, on a consent decree is an "impermissible collateral attack" on the decree.[17] We do not follow this path

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14. The opinions in *Thaggard v. City of Jackson*, 618 F.2d 272 (5th Cir. 1980), and *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980), which dealt with these issues, were both later vacated on other grounds.

15. *See infra* note 17.

16. This discussion assumes that consent decrees and judgments are equivalent for res judicata and collateral estoppel purposes. Some courts give consent decrees such preclusive effects; others do not. For a discussion of the rationales for giving consent decrees less preclusive effect than an ordinary judgment, namely, that the merits are not fully litigated, see 1B Moore on Federal Practice § 444(3) (2d ed. (1983)).

17. This idea arose from a spate of cases finding, in specific circumstances, that the plaintiff's collateral attack on the prior judgment was impermissible. *See, e.g., Black and White Children of the Pontiac School System v. School Dist.*, 464 F.2d 1030 (6th Cir. 1972) (stating that a suit seeking injunction against enforcement of a busing order on the ground of unforeseen difficulty should have been brought as a suit to modify the order in the original court.); *Prate v. Freedman*, 430 F.Supp. 1373 (W.D.N.Y.) *aff'd* 573 F.2d 1294 (2d Cir. 1977) (refusing to allow an attack on the merits of the judgment); *Oburn v. Shapp*, 70 F.R.D. 549 (E.D.Pa) *aff'd* 546 F.2d 417 (3d Cir. 1976) *cert. denied* 430 U.S. 968, 97 S.Ct. 1650, 52 L.Ed.2d 359 (1977).

to the extent that it deprives a nonparty to the decree of his day in court to assert the violation of his civil rights. If we refuse to hear a discrimination claim by a person whose interests are not represented in the decree, we create an exception to the limitations we presently place on res judicata and collateral estoppel. We should not undertake such action lightly. Naturally, that the employer undertook the challenged action pursuant to a court-approved consent decree or a valid affirmative action plan (see, e.g. *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979)), would be evidence of nondiscriminatory intent by the employer, and the nonparty could not seek to relitigate the merits or reasonableness of the decree vis-a-vis the parties to the decree.

In their motion to intervene, the BFA members could not have alleged that they had suffered any reverse discrimination as a result of the Board's or the City's implementation of the affirmative action plan prescribed by the consent decrees, because the court had not yet approved those decrees. BFA members could present such a claim now, however, since the decrees have been approved and entered. For example, they could do so by instituting an independent Title VII suit, asserting the specific violations of their rights. The consent decrees would only become an issue if the defendant attempted to justify its conduct by saying that it was mandated by consent decree.[18] If this were the defense, the trial judge would have to determine whether the defendant's action was mandated by the decree and, if so, whether that fact alone would relieve the defendant of liability that would otherwise attach. This is, indeed, a difficult question. One of the prime reasons why a trial judge must proceed with caution and circumspection in approving consent decrees, [19] especially when the interests of all who may be affected by the decree are not adequately represented, is to avoid this very question. We should not, however, preclude potentially wronged parties from raising such a question merely because it is perplexing. Since we assume that the forum hearing any future suit by the would-be intervenors alleging discrimination would consider their claims carefully, we hold that the district court was justified in finding no prejudice to the BFA members' rights in denying intervention.[20]

Finally, under the fourth timeliness factor, there are no mitigating circumstances as were present in *Stallworth*. There, when the defendants sought permission to inform the would-be intervenors of their rights at an earlier point in the litigation, the plaintiffs thwarted the attempt. When the would-be intervenors ultimately did move to intervene, plaintiffs complained that intervention should not be allowed because the motion was untimely. The court found the plaintiffs' problem to be partly of their own making and considered this as a factor in allowing intervention.

Considering the interests under the four-part test articulated in *Stallworth*, we find ample justification for the trial court's determination that intervention should be denied as untimely. The interests of finality of the litigation, the prejudice intervention would have caused the parties to the consent decrees, and the BFA members' early knowledge that their rights could be affected combined to support the trial judge's exercise of his discretion to deny the intervention here. The possibility that the BFA members might be prejudiced by the consent decrees in these cases does not outweigh these considerations. Because we conclude that the district judge did not abuse his discretion, and because the proper denial of a motion to intervene is not a final judgment, *United States v. United States Steel Corp.*, 548 F.2d 1232, 1236 (5th Cir. 1977), we dismiss the BFA members' appeal for lack of jurisdiction. We

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At some point, these cases began to be cited for the proposition that all collateral burdens on a consent decree are per se impermissible. *See, e.g., Dennison v. City of Los Angeles*, 658 F.2d 694 (9th Cir. 1981).

18. It should be clear from this discussion that it is not necessary for the BFA members to make a frontal attack on the validity of the decrees between the parties in order to assert a discrimination claim against their employers.

19. The judge must be cautious in approving consent decrees only to the extent that he should be aware the decree is more likely to be of little effect the fewer parties there are in the suit to be bound. The consent decree by definition only binds those who consent (either expressly or impliedly).

20. For a discussion paralleling this analysis, see *Ashley v. City of Jackson*, U.S., 104 S.Ct. 255, 78 L.Ed.2d 241 (1983) (Rehnquist, J. dissenting from denial of certiorari).

now consider the Firefighters' appeal from the district court's denial of their application for a preliminary injunction.

II.

The grant or denial of a preliminary injunction is a matter within the discretion of the district court, reviewable only for abuse of discretion or if contrary to some rule of equity. *Shatel Corp. v. Mao Ta Lumber and Yacht Corp.*, 697 F.2d 1352, 1354 (11th Cir.1983). That discretion is guided by four prerequisites: the movant must show (1) a substantial likelihood that he will ultimately prevail on the merits; (2) that he will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest. *Id.* at 1354-5. The preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant "clearly carries the burden of persuasion" as to the four prerequisites. *Canal Authority v. Callaway*, 489 F.2d 567 (5th Cir.1974). "The burden of persuasion in all of the four requirements is at all times upon the plaintiff." *Id.* at 573. Because the Firefighters did not carry the burden as to irreparable harm and, thus, were not entitled to a preliminary injunction, it is unnecessary to address the other prerequisites to such relief.[21]

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21. The Firefighters argue that we should be deciding their appeal on the merits because "the validity of the consent decrees is a legal question, as is the question of whether a collateral attack [on the consent decrees] will lie. The only conclusion of law entered by the district court on these issues was a finding that the attack is 'without merit.'" The only appealable judgment that has been entered in the case, however, is the denial of the preliminary injunction. While we may have the power in certain circumstances to consider a preliminary injunction appeal as if on the merits, *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 435 n. 6 (5th Cir. 1981), here, as in *Piedmont*, there was no agreement by the parties to consolidate this appeal with an appeal on the merits; indeed, appellants have not even expressly terminated their presentation of evidence. The judge considered his order a decision only on the preliminary injunction motion; it states that beyond the injunction, "the case is continued for further development and potential trial." Therefore we decline to reach the merits.

Firefighters, in their attempt to have us decide the merits of their case, point to cases in which the appellate court overturned a trial court's decision as to a preliminary injunction where the denial was based entirely on an erroneous view of the law. Whether the court's conclusion of law as to success on the merits is correct or not, we cannot review it in this case because Firefighters have not carried their burden to show irreparable harm. *See infra*, slip op. at 792-793. In this context, any pronouncement on Firefighters' chances of success on the merits would be gratuitous.

Obviously, where a preliminary injunction has been *granted* based on an error law even as to only *one* of the four prerequisites, the injunction must fall because the movant has not met his burden of persuasion on all four counts. Where the injunction is denied, the error of law would have to extend to every prerequisite on which the trial court found against the movant to warrant reversal. Firefighters should note that the trial judge's conclusions of law as well as his findings of fact at the preliminary injunction stage are not binding on him in his determination of the merits. *University of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981).

While this court has indicated that it will presume irreparable harm in a Title VII case in which the employee has exhausted his administrative remedies (*Middleton-Keirn v. Stone*, 655 F.2d 609 (5th Cir.1981), Firefighters have not pursued such administrative remedies here. Hence, the presumption cannot apply. Moreover, Firefighters have made no showing of possible irreparable injury. Even if they eventually prevail on the merits, they will have suffered no injury that could not adequately be compensated through an award of back pay and seniority points along with compelled future promotion. As the Supreme Court stated in *Sampson v. Murray*, 415 U.S. 61, 90, 94 S.Ct. 937, 953, 39 L.Ed.2d 166 (1974) (citation omitted) (emphasis in original):

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

We find no abuse of discretion in the district court's denial of the preliminary injunction.

The appeal in No. 81-7761 is DISMISSED; in No. 82-7129, the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., *et al.*,

Defendants.

CIVIL ACTION NO.
CV 83-AR-2116-S

ORDER

Defendants in this cause, Richard Arrington, Jr. and the City of Birmingham, have filed a Motion to Consolidate this case with the "pending case" *United States v. Jefferson County*, CV No. 75-P-0666-S. Defendants Hiram Y. McKinney, James B. Johnson and Roderick Beddow, Jr. and the Personnel Board of Jefferson County, have answered the complaint in this case without requesting consolidation. The Court has heard and considered arguments and briefs in support of and in opposition to the Motion to Consolidate.

In the first place, this motion is, in effect, no more than a repetition of the previous Motion to Reassign filed by the same defendants. That motion was denied on September 30, 1983. Since September 30, 1983, there has been no material change in the posture of the case.

In the second place, according to the Clerk, *United States v. Jefferson County*, CV 75-P-0666-S is not a "pending case", even though it is open for the purposes of implementation and monitoring compliance. It is, of course, true that the effect, if any, of the Consent Decree entered in CV 75-P-0666-S is, or may be, an issue in this case, but this fact alone does not compel consolidation, particularly inasmuch as the customary consolidation order is for trial purposes only, and there is no trial contemplated in CV 75-P-0666-S.

In the third place, the rationale for "at random" assignment of cases among the judges of The United States District Court for the Northern District of Alabama would be frustrated, and judge shopping would become the order of the day in certain types of cases, if parties are allowed to obtain consolidation of newly filed cases with previously filed or concluded cases because of the similarity of issues. The judge to whom this case has been routinely assigned may or may not be as well equipped to determine the issues here presented as are other judges of this Court, but "luck-of-the-draw" case assignments are premised, as they must be, on the assumption that every judge of this court can ascertain the applicable law and can fairly determine the pertinent facts. At least theoretically the undersigned can comprehend the decisions of other judges of this Court, as well as he can comprehend the decisions of the Eleventh Circuit and of the Supreme Court. The conflicting pull between judicial economy and a potential for conflicting judicial opinions on the one hand, and a policy of exposing litigants to a variety of judges on the other hand, must be resolved in favor of the random selection of judges. As stated in *United States v. Kelly*, 519 F. Supp. 1029, 1031 (D. Mass. 1981):

> [J]udges do not choose their cases, and litigants do not choose their judges. We all operate on a blind draw system. Sometimes, both litigants and judges are disappointed by the luck of the draw. But the possibility of such disappointment is a risk judges and litigants alike must assume . . .

An example of the problem which would be created by working exceptions to random selection of judges would be defendants in criminal cases attempting to flock to the undersigned judge because of his recent holding that the federal statute requiring victim restitution is unconstitutional, an opinion which is not necessarily shared by all other judges of this Court. The United States District Court for the Northern District of Alabama is not a monolith, nor is there any requirement that it become one. Inconsistencies in the rulings of district courts must await reconciliation in the system of federal appellate courts, including the Supreme Court.

Lastly, movants have not sought to controvert plaintiffs' assertion that defendants have succeeded in resisting plaintiffs' attempts to intervene in CV-75-P-0666-S, a position by defendants which seems inconsistent with their Motion to Consolidate.

For these separate and several reasons, defendants' motion is DENIED.

DONE this 13th day of December, 1983.

/s/ William M. Acker Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

ANSWER OF DEFENDANT-INTERVENORS JOHN W. MARTIN, MAJOR FLORENCE, IDA MCGRUDER, SAM COAR, WANDA THOMAS, EUGENE THOMAS AND CHARLES HOWARD

In answer to each numbered paragraph of the complaint, the defendants John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard admit, deny, and otherwise respond as follows:

1-7. Admit.

8-10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of these paragraphs.

11. Deny.

12. Defendants are without knowledge or information sufficient to form a belief as to whether black persons promoted instead of the plaintiffs were less qualified than the plaintiffs to perform the duties of a fire lieutenant. Defendants deny all other allegations.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of this averment.

14. Deny.

15. Defendants are without knowledge or information sufficient to form a belief as to the truth of this averment.

FIRST AFFIRMATIVE DEFENSE

As a first affirmative defense, the defendant-intervenors allege:

1. In January 1974 the defendant-intervenors filed in this Court Civil Action No. 74-Z-0017-S (the "*Martin* suit") alleging that they and the members of a class of blacks which they represented were being discriminated against, upon the basis of their race, in employment by the City of Birmingham. In addition to other relief, the *Martin* suit prayed for an order requiring that blacks be hired and promoted in sufficient numbers to overcome the effects of past discrimination.

2. In June 1981, after extensive negotiation, the parties to the *Martin* suit submitted to this Court for its approval two proposed consent decrees, one disposing of all issues concerning the City of Birmingham and the other disposing of all issues concerning the Jefferson County Personnel Board. On August 21, 1981, this Court, after public notice of the proposed decrees and after a fairness hearing, approved and entered the proposed decrees.

3. The consent decrees in the *Martin* suit require the Personnel Board to certify and the City to employ qualified blacks in such numbers that the percentage of blacks employed in various described job categories will meet certain goals set forth in the consent decree with the City. In order to permit the City to meet these goals, the Personnel Board decree sets for the Board an annual goal of certifying, subject to the availability of qualified candidates, black applicants for certain named job classifications at rates no less than the certification goals set forth in the decree nor less than the percentage of blacks among the qualified applicants.

4. The above-described terms of the decrees require the Personnel Board, under some circumstances, to certify some qualified black applicants without regard to whether they are more or less qualified than some white applicants and re-

quire the City, if necessary to meet its hiring and promotional goals, to appoint such blacks.

5. Conduct of the City and the Personnel Board here complained of by the plaintiffs in their complaint is required of the City and the Personnel Board by the terms of the *Martin* consent decrees.

6. The consent decrees in *Martin* are valid final judgments of a court of competent jurisdiction and are not subject to collateral attack in this proceeding.

7. The claim herein is an impermissible collateral attack on the *Martin* decrees.

SECOND AFFIRMATIVE DEFENSE

As a second and separate affirmative defense, the defendant-intervenors allege:

1. They reallege each allegation of the first affirmative defense.

2. Each of the plaintiffs knew of the *Martin* suit soon after it was filed.

3. On January 10, 1977, this Court entered partial judgment for the plaintiffs in the *Martin* suit, based on a finding that two particular tests administered by the Personnel Board were racially discriminatory, and ordered that black applicants for positions in the Fire Department be processed in certain prescribed ratios, as compared to white applicants, until such time as the Board developed valid tests. The entry of this order had wide notoriety in the community and within the Fire Department and was at that time known, or should have been known, to the plaintiffs in this action.

4. Each of the plaintiffs had notice of the proposed consent decrees in the *Martin* suit and had prior notice of, and could have attended, this Court's fairness hearing of August 4, 1981, on the proposed decrees.

5. The effect of the *Martin* consent decrees on the conduct of the City and of the Personnel Board, which effect is here

complained of by the plaintiffs, was generally anticipated at the fairness hearing and should have been anticipated by the plaintiffs.

6. The plaintiffs' action is barred by laches.

WHEREFORE, defendant-intervenors pray that plaintiffs take nothing by their suit, that judgment be entered for the defendants and that defendant-intervenors be awarded their costs of suit and reasonable attorneys' fees.

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Attorneys for the Defendant-
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By: /s/ Susan Williams Reeves

February 9, 1984

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

**MOTION TO INTERVENE AS
PARTIES DEFENDANT**

John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard, both in their individual capacities and as representatives of a class of plaintiffs' in *John W. Martin, et al.* v. *City of Birmingham, et al.*, Civil Action No. 74-Z-0017-S, move to intervene in this action as a matter of right under Rule 24(a) of the Rules of Civil Procedure and to be permitted to intervene pursuant to Rule 24(b) of the Rules of Civil Procedure upon the following grounds:

1. The complaint in this action alleges that each plaintiff is a white, male firefighter employee of the City of Birmingham Fire Department who has applied for promotion within the Department, that the defendant Jefferson County Personnel Board has discriminated against the plaintiffs upon the basis of their race and sex by certifying blacks and women for appointment upon the basis of their race or sex, and that the defendant City has similarly discriminated against the plaintiffs by selecting blacks and women for promotion on the basis of their race or sex. The complaint prays that such conduct be enjoined.

2. The defendants have filed answers asserting, among other matters, that any consideration which they may have given to the race or sex of blacks and women in certifying

eligible candidates for promotion or in selecting from among such candidates has been pursuant to consent decrees previously entered by this Court in Civil Actions Nos. 75-P-0666-S, 74-Z-0012-S, and 74-Z-0017-S.

3. The claims and answers herein necessarily draw into question the meaning, application and validity of the consent decrees in Civil Action No. 74-Z-0017-S.

4. Movants John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard are plaintiffs in Civil Action No. 74-Z-0017-S, titled *John V.* [sic] *Martin, et al.* v. *City of Birmingham, et al.*, and the class they represent are entitled to enjoy the benefits of the consent decrees therein entered.

5. The consent decrees in *John V.* [sic] *Martin, et al.* v. *City of Birmingham, et al.* are valid on their face and are not subject to collateral attack in this proceeding.

6. The interest of the movants, both on their own behalf and on behalf of the class they represent, in the integrity and proper implementation of the consent decrees in *John W. Martin, et al.* v. *City of Birmingham, et al.* is such that the relief sought in this action, if granted, may as a practical matter impair and impede the ability of the movants to protect that interest. None of the present parties to this action is a beneficiary of the terms of the consent judgments in *John W. Martin, et al.* v. *City of Birmingham, et al.* and none can adequately represent this action in the interest of the movants.

7. As appears more particularly from the attached Answer, which movants propose be filed if their Motion to Intervene is granted, the movants seek to assert defenses in this action that have questions of both law and fact in common with defenses asserted by the present defendants.

A proposed answer of the movants is attached.

Movants request oral argument of this motion.

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Attorneys for Movants

By /s/ Susan Williams Reeves

February 9, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS; CARLICE E. PAYNE and RONNIE J. CHAMBERS, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

COMPLAINT IN INTERVENTION

Come now plaintiff-intervenors John E. Garvich, Jr., James W. Henson and Robert Bruce Millsap and state the following as their Complaint:

(1) Intervenors adopt by reference the following paragraphs from the Complaint, as amended, of the original plaintiffs: (1), (2), (3), (4), (5), (6) as amended, (7), (8), (9), (10), (11), (12), (13), (14) and (15), and make the same allegations as therein contained on behalf of themselves, as well as the original plaintiffs.

(2) The City of Birmingham and Mayor Arrington have failed to promote plaintiff-intervenors Garvich, Henson and Millsap to the classification of Fire Lieutenant because of their race (white). The City intentionally promoted blacks on the basis of their race.

WHEREFORE, plaintiff-intervenors adopt by reference and make on behalf of themselves, as well as the original plaintiffs, the same prayer for relief as that set forth in the original Complaint, as amended.

/s/ Raymond P. Fitzpatrick, Jr.
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Attorney for Plaintiff-Intervenors
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[Certificate of Service, dated February 22, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS; CARLICE E. PAYNE and RONNIE J. CHAMBERS, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

MOTION TO INTERVENE

Come now John E. Garvich, Jr., James W. Henson and Robert Bruce Millsap and respectfully move this Honorable Court for leave to intervene as parties plaintiff in this cause pursuant to Rules 24(a) and 24(b), Federal Rules of Civil Procedure. In support thereof, movants state:

(1) Movants are white male employees of the City of Birmingham Fire and Rescue Service. Movants present claims substantially identical to the claims of the original plaintiffs in this action in that movants were denied promotions to the classification of Fire Lieutenant on the basis of their race, and movants have been similarly damaged by the Personnel Board defendant's practices of certification on the basis of race.

(2) The movants claim an interest in the transactions which are the subject of this action in that movants seek to challenge as illegal and unconstitutional the actions of the defendants in the same manner as the original plaintiffs, the movants present the same arguments as the original plaintiffs, the movants have been victims of the same practices as the original defendants, and the movants seek relief similar to that of the original plaintiffs.

(3) Disposition of this action, without movants' participation may, as a practical matter, impair or impede the ability of movants to protect their interests.

(4) The interests of movants is not adequately represented by the original plaintiffs in that said parties may not adequately seek all relief available to the movants upon a finding of liability.

(5) The movants' claims present common questions of law and fact with the claims of the original plaintiffs.

(6) Movants have exhausted their administrative remedies and hold Right to Sue letters from the E.E.O.C.

(7) Filed herewith is a proposed Complaint in Intervention.

/s/ Raymond P. Fitzpatrick, Jr.
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[Certificate of Service, dated February 22, 1984, omitted]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

ROBERT K. WILKS; CARLICE E. PAYNE and RONNIE J. CHAMBERS, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

OPPOSITION TO MOTION TO INTERVENE AS PARTIES DEFENDANT OF MARTIN, *ET AL.*

Plaintiffs oppose the Motion to Intervene of John W. Martin, et al., individually and as class representatives, for that:

(1) Said putative intervenors are without standing to contest the relief sought by plaintiffs. They have alleged no peculiar benefit they allegedly receive under "consent decrees" in any other case. Whether the defendants herein have discriminated or are engaging in a continuing policy of discrimination toward the plaintiffs is not a transaction or subject matter in which the putative intervenors have any interest.

(2) There has been no allegation that any of the putative intervenors are employees of the City of Birmingham or the Fire Department. There has been no allegation that said putative intervenors have any statutory, constitutional or contractual interest in the race-conscious promotional and referral policies of the defendants. On the contrary, plaintiffs allege that none of the putative intervenors are employees of the Fire Department or have any interest in Fire Department promotions.

(3) The movants have failed to allege in any manner their claim to act on behalf of a class, be it certified or alleged, so as to comply with Rule 23, Fed. Rules of Civ. Pro. There is no adequate description of the class of persons certified.

(4) Any peculiar relief provided to the movants and those whom they represent in *Martin* vs. *City of Birmingham*, CV-74-Z-0017-S, has been accepted and further claims by the movants have been released.

(5) The existing defendants are adequately representing the alleged interests of movants.

(6) Movants are not necessary parties to this action.

(7) Plaintiffs do not oppose the movants, or more correctly their counsel, appearing as *amici curiae* in order to state their views on racial quotas.

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[Certificate of Service, dated February 22, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

SECOND OPPOSITION TO MOTION TO INTERVENE AS PARTIES DEFENDANT OF MARTIN, *ET AL.*

In further statement in opposition to the Motion to Intervene of Martin, et al., plaintiffs respectfully show unto this Honorable Court as follows:

(1) The actions of movants are clearly untimely. The movants have been aware of this case since shortly after the date on which it was filed and yet have taken no steps toward asserting their alleged interest until after discovery began and the case was set for pre-trial conference. *See*, letter of Ms. Susan W. Reeves to the Court dated November 14, 1983, which is attached hereto as Exhibit A. Extensive discovery has already been conducted and the Court has entered Orders concerning transfer and consolidation motions which the putative intervenors will probably seek to overturn. The prejudice to the existing parties will be significant.

On the other hand, denial of intervention to movants will cause no prejudicial effect to them because movants have no protectable interest which is the subject of this litigation. Should the movants be denied some peculiar benefit they enjoy under their consent decrees, they may seek to enforce such consent decrees by appropriate action in that litigation. Apparently, movants fail to accept that the Court of Appeals has ruled that the terms of their consent decrees are not binding on nonparties and cannot vitiate the statutory and constitutional rights

of persons nc: parties to a consent decree. *U. S. A.* vs. *Jefferson County*, 720 F.2d 1511 (11th Cir., Dec. 12, 1983); see, also, *W. R. Grace & Co.* vs. *Local Union 759, Etc.*, ___ U.S. ___, 51 U.S.L.W. 4643 (May 31, 1983); and, generally, Plaintiffs' Brief In Opposition To Motions To Transfer Or Consolidate (filed Dec. 2, 1983), and cases cited therein.

Under the four criteria of *Stallworth* vs. *Monsanto*, 558 F.2d 257 (5th Cir. 1977), the motion for intervention under Rules 24(a)(2) and 24(b) is untimely. Plaintiffs do not view their position as inconsistent with their approval of the announced intent of the United States to intervene as a party plaintiff, in that the United States has a statutory right to intervene under Rule 24(a)(1) and it will not be an obstacle to a speedy and inexpensive resolution of this litigation by seeking to overturn prior Orders entered in this case.

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.
Attorney for Plaintiffs
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(252-4660)

[Certificate of Service, dated February 24, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS; CARLICE E. PAYNE and RONNIE J. CHAMBERS, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S
PETER J. ZANNIS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2480-S

The above-entitled matter came on to be heard before the Honorable William M. Acker, Jr., United States District Judge, on the 28th day of February, 1984.

* * *

[Page 23]

I would be glad to hear from you if you want to be heard today in support of the motion to intervene. But I will defer to Ms. Reeves as to how she wants to handle that and I will enter a formal order admitting them for that purpose.

MS. REEVES: Thank you, Your Honor. We are prepared and we did request oral argument on our motions.

Mr. Joffee [sic] is prepared to do that oral argument, but we thought it would be appropriate to respond to any questions

the Court might have if you have had an opportunity to read our brief.

THE COURT: I have read your brief and I have read what Mr. Fitzpatrick filed in response. I guess that there are several paradoxial [sic] aspects to this situation.

The one that I am thinking of right now is the successful resistance to intervention in the other case, which was spoken to by the 11th Circuit. Which just a cursory reading of it, of their opinion, seems to invite what Mr. Fitzpatrick has already done —

MR. JOFFEE [sic]: Yes, Your Honor. If I might

[Page 24]

respond to this. I think it did, and I think that is probably why we are here. But I don't think it is inconsistent at all with what is going on today.

The principal ground that we resist interention [sic], clearly the grounds on which the 11th Circuit decided it was that they were seven years later filing a motion for intervention. They filed for intervention in 1981. The action was instituted in January of 1974.

They filed, at the hearing on the approval of the Consent Degree [sic] and Judge Pointer decided it was untimely. Had they moved to intervene seven years earlier I don't think our position would be the same.

In any event, we certainly have not waited seven years to move to intervene.

THE COURT: I don't recall the 11th Circuit mentioning the seven years delay.

MR. JOFFEE [sic]: It does, Your Honor.

THE COURT: It does?

MR. JOFFEE [sic]: Yes.

THE COURT: It has been a while since I read it. I just read these things as they come across my desk. Seems like there is about 15 a week.

MR. FITZPATRICK: Your Honor, if I may respond to that.

THE COURT: Wait a minute. Let him finish.

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MR. JOFFEE [sic]: I think the principal ground — in fact, the principal ground Judge Pointer denied intervention on, the 11th Circuit affirmed on, was it was untimely. But there is an additional difference. They were not representing a class and they, of necessity, were pressing their own individual rights which may or may not have been in jeopardy that time.

We are in a somewhat different position. We are signatories to a decree and have contractual rights for relief in the future, which we are seeking to vindicate or protect, really, against any consistent interpretation of the two or a complete emasculation of it.

So we both represent a class and are signatories of the decree. And that puts us in quite a different posture other than they were in that case.

I think the primary difference is that Judge Pointer denied their motion and the 11th Circuit affirmed on the untimeliness ground.

* * *

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THE COURT: Well, I am not, in deciding whether to allow intervention by the beneficiaries of the Consent Decree, I would not be controlled by my understanding of whether the United States, as an intervenor here would adequately represent their interest. What I would be controlled by is whether the City of Birmingham and the Personnel Board who seem to agree with the beneficiaries of the decree, and it has expressed a brief and interpretation, same interpretation, or adequately repre-

sented and will adequately represent that interest. That is what I want to hear from you right now.

MR. JOFFEE [sic]: Your Honor, could I respond to that, because there is a point which we didn't include in our papers which bears on that.

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The 11th Circuit, I think, has said quite clearly, although I only found it this morning, that the City is not an adequate representative for an interest and I would like to bring that point to your attention.

In the situation you referred to earlier where Mr. Fitzpatrick's clients filed a motion to intervene before Judge Pointer, Judge Pointer denied it and it went up to the 11th Circuit. The issue was untimeliness.

Mr. Fitzpatrick argued to the 11th Circuit that the reason for excusing their late motion was that they had believed that the City represented their interests and that the City would defend their position, and it came as quite a surprise when, in the end, the City caved in and signed the Consent Decree. If I may be a little colloquial —

THE COURT: Probably sounds just like Mr. Fitzpatrick.

MR. JOFFEE [sic]: The 11th Circuit said that was insufficient in language, I think, was clear that the City cannot represent, or if I could quote from the 11th Circuit's opinion at 720 Fed 2d 516, 1970. From the beginning the Board and the City represented a wide range of occupations in the public status and

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had different cost benefit settlement interests and incentive from those of the V.F.A. members, those of Mr. Fitzpatrick's clients, thus, the mere fact that the Board and City made a settlement allegedly adverse to the interest of the V.F.A. members does not mean they changed their position and came adverse, as the V.F.A. members alleged in their motion to intervene.

And that same situation existed here, whereas on the surface, the City and we may be taking the same position on certain of the issues in various courts, our interests are really quite different. They would defend us in the action we originally brought. They are now under an order to comply with the decree. We are the beneficiaries of the decree.

On behalf of our clients we seek the widest possible protection of that decree. They act as [sic] their peril everytime they make a promotion, everytime they hire someone, that someone in going to sue them, either someone in our class, for not getting the benefits of the decree or someone like Mr. Fitzpatrick's clients, that they are getting the wrong end of the decree.

The City has to walk a different line than we and we cannot look to the City to protect our interest.

* * *

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MR. JOFFEE [sic]: There is, if I might just pinpoint this, because it seems to come up continually.

There is a big difference in the 11th Circuit — you had whites who were not facing discrimination with respect to any particular thing that was taking place, and they were concerned that a decree that was being entered, they were not parties to, might adversely affect them in the future.

That is one situation. I believe the reason Mr. Fitzpatrick was denied intervention was because he was seven years late. But at least that was the situation he had, where he had white individuals who could show no right other than that some day in the future they might be discriminated against in violation of the constitution or other laws.

We are in a very different situation. We have a contractual right and a Consent Decree right enforced

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by an injunction for this court, that in the promotion and hiring decisions that are taken over the next six years, we will be treated in a certain way. And one of the cases we cited to you,

Your Honor, in the brief, a third circuit case involving AT&T and the EEOC, it seems to me exactly on point.

The EEOC sued AT&T for discrimination and they entered into a Consent Decree which the Court was about to approve. Along came the union which had it's [sic] own contractual arrangements with AT&T and said, "My goodness, Court, if you entered this decree you are going to impair our contractual rights. We have a right to intervene." AT&T opposed that intervention and the Court allowed it and the third circuit affirmed the intervention.

Here we have a contractual right with one of the parties, the City, which is in danger and it is actually more than a contract, it is a consent decree and seems to me that is the difference in our situation today, quite apart from the fact that he was seven years late —

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

MEMORANDUM OPINION AND ORDER

The Court has considered briefs and heard oral argument on the following questions:

1. What is the definition and scope of the proposed intervention by the United States of America?

2. Do John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard (Martin, et al.), both in their individual capacities and as representatives of a class established in *Martin v. City of Birmingham*, CV 74-Z-0017-S, have a right to intervene as parties defendant?

3. Do John E. Garvich, Jr., James H. Henson and Robert Bruce Millsap (Garvich, et al.) have a right to intervene as parties plaintiff?

In response to the Court's request and with concurrence of the parties, the United States, by letter of February 10, 1984, copy of which is attached hereto, indicated its intention to intervene on behalf of plaintiffs. At the status conference held on February 28, 1984, the United States reiterated its intention as thus expressed, but the United States has not yet filed any formal pleading. The Court deems the United States now to be an intervenor on behalf of plaintiffs, with the right to participate fully in discovery for the purpose of ultimately ascertaining its

position both with respect to the pertinent factual allegations and the requested relief, and without now vouching for the truth of the plaintiffs' factual averments. Pursuant to 42 U.S.C. §2000(e)5(f)(1), the Court hereby exercises its discretion to allow said intervention by the United States and agrees with the United States that this cause is of such general public importance as to call for full participation by the United States. The Court will not only permit the United States to engage in discovery but hereby exposes it to discovery by the other parties to the extent such discovery may be appropriate. Unless the United States, for good cause, requests an extension, it is hereby required to file a compla nt-in-intervention on or before June 15, 1984, stating its position with respect to the factual allegations, the legal conclusions and the relief it deems appropriate.

The Court takes judicial knowledge of the proceedings and prior orders in CV 74-Z-0017-S in this Court wherein Martin, et al., are the representatives of a class and the beneficiaries of a consent decree. From the vigorous defense being offered in the instant cause by defendants City of Birmingham and Personnel Board of Jefferson County, it would seem that the interests of Martin, et al., are being adequately represented without their participation as formal parties. Nevertheless, because of the general public importance of the case, and because of the sincere doubts expressed by Martin, et al., as to the adequacy of the representation of their interests, the Court will allow intervention by Martin, et al., under Rule 24(b), F.R.Civ. P., as *individuals* but not as representatives of a class, that is, unless and until Martin, et al., meet the requirements of Rule 23, F.R.Civ.P., in *this* case. Neither Rule 23 nor Rule 24 contemplates that a class determined to exist in one case can intervene, as such class, in *another* case. If the Court is incorrect in its reading of Rules 23 and 24, the question of whether the intervention should be as individuals or as a class may be academic in light of the fact that the primary purpose for intervention here by Martin, et al., is to assure that their viewpoint will be fairly and fully presented. If Martin, et al., wish the adjudication in this case to be binding upon a class, they must seek class certification as a defendant class under the procedures and requirements of Rule 23. Unfortunately, the

invocation of such procedures runs headlong into the clear requirement of Rule 24(b) that intervention not "unduly delay. . . the rights of the original parties".

The petition of Garvich, et al., to intervene as parties plaintiff meets the requirements of Rule 24(b) and is due to be granted. Henceforward these three new parties shall be desiganted [sic] simply as "plaintiffs" rather than as "intervenors", inasmuch as they are represented by the counsel who represents the original plaintiffs, and all further pleadings shall treat Garvich, et al., as if they had been original plaintiffs.

The pre-trial conference now scheduled for April 12, 1984, is hereby CONTINUED and is re-set on June 1, 1984, at 1:30 P.M., in accordance with the attached pre-trial instructions. All discovery shall be completed on or before June 15, 1984.

DONE this 5th day of March, 1984.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S
WILLIAM L. GARNER, *et al.*, *Plaintiffs*, v. CITY OF BIRMINGHAM, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-M-1461-S
BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S
PETER J. ZANNIS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2680-S

MOTION OF DEFENDANT-INTERVENORS TO CONSOLIDATE

Defendant-Intervenors ("Intervenors") John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard move this Court pursuant to Fed. R. Civ. P. 42(a) to consolidate for purposes of early resolution of common legal issues, discovery and trial, the cases of *Garner v. City of Birmingham*, Civil Action No. CV82 M 1461S (filed July 1, 1982) ("*Garner*"), *Birmingham Association of City Employees v. Arrington*, Civil Action No. CV82 P 1852S (filed August 30, 1982) ("*B.A.C.E.*"), *Wilks v. Arrington*, Civil Action No. CV83 AR 2166S [sic] (filed September 7, 1983) ("*Wilks*"), and *Zannis v. Arrington*, Civil Action No. CV83 AR 2680S (filed November 7, 1983) ("*Zannis*") with the earliest filed action of *Bennett v. Arrington*, Civil Action No. CV82 P 0850S (filed April 8, 1982) ("*Bennett*"), which is now pending before Chief Judge Sam C. Pointer. As grounds therefor, Intervenors show the Court as follows:

1. The *Bennett*, *Garner*, *B.A.C.E.*, *Wilks* and *Zannis* actions involve numerous central common issues of law and fact:

(a) The earlier filed *Bennett*, *Garner*, and *B.A.C.E.* actions are explicit collateral attacks upon the consent decrees approved by this Court and entered in the consolidated actions of *Martin v. City of Birmingham*, Civil Action No. 74 Z 17S ("*Martin*"), *United States v. Jefferson County*, Civil Action No. 75 P 0666S ("*Jefferson County*") and *Ensley Branch of NAACP v. Seibels*, Civil Action No. 74 Z 12S ("*Ensley Branch*") ("the Consent Decree Cases"). The *Wilks* and *Zannis* Complaints do not mention the consent decrees, but the plaintiffs have stated their view that "the only real issues" in those actions turn on the "consent decrees". Plaintiffs' Brief in Opposition to Motions to Consolidate, *Zannis v. Arrington* (December 2, 1983) at 3.

(b) Plaintiffs in all five actions are white males charging reverse discrimination. Plaintiffs in *Bennett*, *B.A.C.E.*, *Wilks* and *Zannis* are represented by the same counsel.

(c) The City of Birmingham and the *Martin* plaintiffs are defendants in all five actions. Mayor Arrington, the Jefferson County Personnel Board

and its members are defendants in *Bennett*, *B.A.C.E.*, *Wilks* and *Zannis*.

(d) All five Complaints charge that defendants are impermissibly using race and sex to determine employment and promotional opportunity, and thus seek to draw in issue the scope and lawfulness of the race- and sex-conscious relief contemplated by the consent decrees.

(e) All five Complaints charge the defendants with violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. *Bennett*, *B.A.C.E.*, *Wilks* and *Zannis* also aver violations of the Fifth and Fourteenth Amendments to the United States Constitution, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and the Local Fiscal Assistance Act of 1972.

(f) All five Complaints seek an injunction barring the use of race or sex as a criterion in hiring, transfer or promotional decisions.

2. Because of the broad identity of parties and issues in the five cases, consolidation will avoid wasteful and duplicative motion practice, discovery and presentation of evidence and will speed the resolution of all five actions.

3. Consolidation will avoid the risk of conflicting adjudications by different judges of this Court which could impose inconsistent standards of conduct upon the litigants.

4. Consolidation of these related actions is consistent with this Court's prior practice in the Consent Decree Cases. *Martin*, *Ensley Branch* and *Jefferson County* were all filed separately but were consolidated by this Court for purposes of discovery and trial.

5. The *Wilks* and *Zannis* Complaints were filed over a year after the Complaints in *Bennett*, *B.A.C.E.* and *Garner*. Consolidation of those later filed actions with the earlier filed cases before Chief Judge Pointer is therefore appropriate.

WHEREFORE, for the reasons stated above and in the accompanying Memorandum of Law, Intervenors pray that the

court enter an order consolidating *Garner*, *Bennett*, *B.A.C.E.*, *Wilks* and *Zannis*.

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Attorneys for Intervenors

March 15, 1984

[Certificate of Service and memorandum omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et. al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

ORDER

Defendants-intervenors, John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard, have filed a motion seeking to have this case consolidated with (1) *Peter J. Zannis, et al. v. Richard Arrington Jr., et al.*, CV 83-AR-2680-S, (2) *James A. Bennett, et al., v. Richard Arrington, Jr., et al.*, CV 82-P-0850-S, (3) *William L. Garner, et al., v. City of Birmingham, et al.*, CV 82-M-1461-S and (4) *Birmingham Association of City Employees, et al., v. Richard Arrington, Jr., et al.*, CV 82-P-1852-S, none of which cases has previously been consolidated with any of the others, although three of the cases have been pending since 1982.

When the judge to whom this case was routinely assigned granted the petition of Martin, et al., for leave to intervene pursuant to Rule 24(b), F.R.Civ.P., he apparently failed to make clear to the intervenors that this case, although potentially involving a consideration or application of a consent decree entered in another case in The United States District Court for the Northern District of Alabama, must stand on its own bottom, and will not be consolidated with other cases by this judge. Intervenors cannot be allowed, in effect, to control the litigation, particularly where the case has already been set for a pretrial conference and where consolidation with several other

cases would be likely to "unduly delay . . . the rights of the original parties", contrary to Rule 24(b).

The motion to consolidate is DENIED. There is, however, no intention to rule on any motion pending in a case not assigned to the undersigned.

DONE this 20th day of March, 1984.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*, JOHN W. MARTIN, *et al.*, *Defendants - Intervenors.*	CIVIL ACTION NO. CV 83-AR-2116-S

AMENDED ANSWER OF DEFENDANTS
RICHARD ARRINGTON, JR.
AND THE CITY OF BIRMINGHAM

For answer to the Complaint in Intervention, filed by John E. Garvich, Jr., James W. Henson, and Robert Bruce Millsap, allowed by Order of March 5, 1984, these defendants amend their answer as follows:

1. These defendants adopt by reference the affirmative defenses 1 through 5 of their original answer.

2. These defendants further adopt the Sixth Defense in specific response to Paragraph 1 of the Complaint in Intervention.

3. These defendants deny the allegations of Paragraph 2 of the Complaint in Intervention, except that these defendants admit that they consider race in promotion and employment decisions, to the extent required by the provisions of the Consent Decree heretofore entered in Civil Action Nos. 75-P-0666-S, 74-Z-12-S and 74-Z-17-S.

4. Except as herein expressly admitted the allegations of the Complaint in Intervention are denied.

/s/ James K. Baker
James K. Baker

/s/ James P. Alexander
James P. Alexander

/s/ Robert K. Spotswood
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[Certificate of Service, dated March 26, 1984 omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S
WILLIAM L. GARNER, *et al.*, *Plaintiffs*, v. CITY OF BIRMINGHAM, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1461-S
BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S
PETER J. ZANNIS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2680-S

PLAINTIFFS' ANSWER OPPOSING DEFENDANT-INTERVENORS' MOTION TO CONSOLIDATE

Plaintiffs in *Wilks*, *Zannis*, *Bennett* and *BACE* hereby oppose the Motion of Defendant-Intervenors to Consolidate. It calls for the consolidation of cases pending before different Judges, and consequently would also require a transfer or reassignment. Because one of these Judges, The Honorable William M. Acker, Jr., has denied the Motion, *see* March 20, 1984 Order, *Wilks v. Arrington*, No. 83-AR-2116-S (N.D.Ala. Sept. 7, 1983) ("*Wilks*"); March 20, 1984 Order, *Zannis v. Arrington*, No. 83-AR-20680-S (N.D.Ala. Oct. 1973) ("*Zannis*"), we respectfully suggest that reassignment and consolidation is inappropriate.

Plaintiffs herein therefore urge Chief Judge Pointer to deny the Motion to Consolidate in the cases before him. Under Rule 42 of the Federal Rules of Civil Procedure ("FRCP"), consolidation is a matter for the discretion of the Judge. Where two Judges are involved, both must agree if their individual discretion is to be preserved.

Morever, Judge Acker's March 20 Orders in *Wilks* and *Zannis* are grounded, in part, on his unwillingness to allow Defendant-Intervenors to control the litigation by upsetting an established pre-trial schedule. Judge Acker feared that consolidation by an intervenor would unduly delay adjudication of the rights of the parties. This is, of course, at odds with the purposes of intervention under FRCP Rule 24, and this specific admonition of Judge Acker to the Defendant-Intervenors. And, finally, Plaintiffs believe that when a claim of illegal racial discrimination is involved, victims should not be buffetted from courtroom to courtroom simply on the basis of projections that long-term judicial economy will result. Given different Judges who are ready, willing and able to accord different victims expeditious individual hearings, they should suffer no delay in adjudication of their rights because related legal questions are presented in other cases within this District.

Plaintiffs believe that Defendant-Intervenors' Motion transgresses the spirit as well as the terms of their intervention

under FRCP 24(b) in *Zannis* and *Wilks*, which provides against participation which will unduly delay the rights of the original parties. Judge Acker granted intervention to movants in *Wilks* with an express warning against procedural devices that would unduly prolong the case. *See Memorandum Opinion and Order* at 2-3 (Mar.6, 1984) (delay in seeking class certification).

Defendant-Intervenors' Motion to Consolidate is especially troubling in view of counsel's representation to the Court at oral argument on their Motion to Intervene:

> THE COURT:
>
> * * *
>
> My question to you is, if I grant your motion to intervene are you going to file a motion to consolidate?
>
> MR. JOFFEE [sic]: I don't think we have crossed that bridge, Your Honor. I would like to make a couple of points.
>
> The motion to consolidate, that was made before Your Honor in both cases, was made to consolidate these cases with the Consent Decree cases, not to consolidate them with BACE and Garner, which are complaints that are virtually identical, word to word, to Zannis and Wilks.
>
> So no motion was made before Your Honor to consolidate those cases with BASE [sic] and Garner, number one.
>
> * * *
>
> The other point is, and this goes, I think, to the point that somehow you are going to have to duplicate anything that has been on before.
>
> It is not our intention to duplicate anything that has been on before . . . .

Transcript of February 28, 1984 hearing at 27-28.

Plaintiffs assert that in the circumstances consolidation may be proscribed by statute as well. Title 28 U.S.C. §137 provides for the division of business among the Judges of the District Court as may be established in rules adopted by agreement of the members of the Court. At bottom, this statute establishes that the principles governing administration of Court affairs are to be made by consensus of the Judges. *See Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100 (10th Cir. 1972) (judge's attempt to reassign cases to himself).

In the *Ritter* case, a random selection process had been established for assignment of cases in the District Court of Utah. The controversy arose when a judge of that court reassigned to himself a case that was pending before a judge who had assumed senior status. The Tenth Circuit held that, under 28 U.S.C. §137, the case should have been reassigned in random fashion unless all the District Court judges could agree on a proper assignment.*

The *Ritter* court stated further that "the independence and integrity of each judge in the district," "public confidence" and "continuity" are protected by the complete agreement needed under 28 U.S.C. §137 and by the supervision of the Circuit Judicial Council under 28 U.S.C. §332. 491 F.2d at 1103.

Plaintiffs believe further that the Motion is an unduly repetitive attack on the District's random selection process for Judges and the principles of comity that make possible the reasonable administration of justice in this Court. The Motion presents the fourth time that consolidation of the legal and factual questions in *Wilks* or *Zannis* with cases before another Judge has been attempted.**

---

* While the *Ritter* case involved violation of a rule established by the Tenth Circuit Judicial Council pursuant to 28 U.S.C. §332, the court clearly noted that its ruling did not depend on the fact that the random selection process had been established by rule of the Circuit Council. Under 28 U.S.C. §137, rules prescribed by the district judges would have the same effect. They would prevent any single judge from modifying existing rules of administration without approval of the other judges. *See* 461 F.2d at 1103.

** The most recent attempt prior to the instant motion occurred when Chief Judge Pointer denied Defendant Jefferson County Personnel Board's Motion to Consolidate *Zannis* with *United States v. Jefferson County*, CV-75-P-0666-S (*"Jefferson County"*).

In a December 13, 1983 Order, Judge Acker gave a number of reasons why consolidation and transfer are inappropriate. Foremost among them was the need to preserve the process of "random selection" by "luck-of-the-draw" Judge assignments. *See* December 13, 1983 Order at 2, *Wilks*.

Judge Acker ruled that this random process of Judge selection should be preserved despite claims of judicial economy and despite the potential for conflicting opinions by Judges of the same District. He cited specifically the dangers of judge-shopping within this District by criminal defendants seeking to avoid victim restitution.

Defendant-Intervenors' Motion and Memorandum offer no reason to reconsider these decisions. Instead, they reiterate previous arguments to the effect that there are common questions of law and fact involved in all the above-styled cases. In truth, they are using nominally different parties to resubmit the matter of consolidation of various allegedly common legal and factual issues to the Court. Three times is enough. And, as argued previously, the mere presence of some common questions of law or fact is not enough to abrogate the Court's discretion in matters of consolidation.

Finally, Defendant-Intervenors have misconstrued Judge Acker's denial of consolidation in *Zannis* on December 13, 1983. There, Judge Acker articulated his understanding of the principles of comity that govern this Court's administration by advising litigants of his deference to the wishes of the Judge with the lowest-numbered cases in matters otherwise proper for consolidation. *See Zannis* Order at 1 (Dec.13, 1983). With respect to *Zannis* and *Jefferson County*, the latter was lower numbered and before Judge Pointer. Judge Acker indicated that he himself would deny consolidation without prejudice to Judge Pointer's ruling on the same proposed consolidation. By no stretch of the imagination does Judge Acker's view amount to an endorsement of a principle of automatic reassignment to Judges with lower-numbered cases. Judge Acker's Order states a rule of deference.*

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* Defendant-Intervenors have suggested that the "random selection" principle encourages, rather than discourages, "judge-shopping" because it encourages litigants to file additional suits in hope of being assigned to a particular judge. *See* Defendant-Intervenors' Memorandum of Law in Support of Motion to Consolidate at 11-12, n.5 (DI Memo). Any suggestion that *Wilks* and *Zannis* were filed in order to obtain a change in the presiding judge is meritless and irresponsible. Separate cases are being filed in compliance with the ruling of the Court of Appeals finding that such individual claims will be heard in this Circuit. *U. S. v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).

Precisely how "random selection" operates to allow selection of a particular judge is unclear. Even if a party has a multitude of common fact situations that would allow him to plot such a use of the selection process in hopes of obtaining "a judge they like" [DI Memo at 11-12, n.5], a rare occurrence, each filing subjects plaintiffs to only the same chance they will be successful. Such rare occurrence hardly provide a basis for abandonment of the random selection rule. Whatever the merits of a principle of automatic assignment, they are not applicable here.

As a general matter, a rule of "automatic" reassignment to the judge presiding over the lowest-numbered action will not solve the problem. Innumerable judgment questions will arise about when cases are sufficiently related to warrant automatic reassignment, *i.e.*, when, in the discretion of the judge, sufficient common questions exist to warrant proceedings in consolidated fashion. And finally, an automatic reassignment rule is an unnecessary attack on the principles of comity that presently govern this Court, which are more appropriate for resolving problems of this case.

For the foregoing reasons, Plaintiffs respectfully request that consolidation be denied.

Respectfully submitted,

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.

/s/ Albert L. Jordan
ALBERT L. JORDAN
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[Certificate of Service, dated March 28, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., *et al.*,

Defendants.

CIVIL ACTION NO.
CV 82-P-1852-S

ANSWER OF DEFENDANT
UNITED STATES OF AMERICA

In answer to each of the numbered paragraphs of the complaint, defendant United States admits, denies, or otherwise responds as follows:

1. Paragraph 1 of the complaint is admitted.

2. Defendant United States is without information sufficient to admit or deny the allegations contained in paragraph 2 of the complaint.

3. Paragraphs 3, 4, and 5 of the complaint are admitted.

4. Defendant United States admits the names of the members and director of the Jefferson County Personnel Board as of the date of the complaint and admits the remaining allegations of paragraph 6 of the complaint.

5. Paragraph 7 of the complaint is admitted.

6. Defendant United States admits the allegations contained in the first two sentences of paragraph 8 of the complaint but is without knowledge sufficient to admit or deny the remaining allegations of the paragraph.

7. Defendant United States admits the allegations contained in the first two sentences of paragraph 9 of the complaint, but is without knowledge sufficient to admit or deny the allegations contained in the third sentence of the paragraph. Defendant United States admits the allegations contained in the fourth sentence of paragraph 9 of the complaint.

8. Defendant United States admits that Lucious [sic] J. Thomas, Jr. is a black male, but is without knowledge sufficient to admit or deny the remaining allegations of paragraph 10 of the complaint.

9. Defendant United States is without knowledge sufficient to admit or deny the allegations contained in paragraph 11 of the complaint.

10. Defendant United States admits that the Personnel Board knowingly certified the fourth name on the list. Defendant United States admits that the City promoted Lucious [sic] Thomas to the classification of Civil Engineer effective September 4, 1982. Defendant United States is without knowledge sufficient to admit or deny the remaining allegations of paragraph 12 of the complaint.

11. Defendant United States is without knowledge sufficient to admit or deny the allegations contained in paragraphs 13 and 14 of the complaint.

12. Defendant United States is without knowledge sufficient to admit or deny the allegations contained in the first sentence of paragraph 15 of the complaint. Defendant United States denies the remaining allegations contained in paragraph 15.

13. Defendant United States is without knowledge sufficient to admit or deny the allegations contained in paragraphs 16 and 17 of the complaint.

14. Paragraph 18 of the complaint is denied.

15. Defendant United States admits the allegations contained in the first sentence of paragraph 19 of the complaint, but is without knowledge sufficient to admit or deny the remaining allegations of paragraph 19.

16. Paragraph 20 of the complaint is admitted, except that defendant United States denies that the consent decrees referenced in paragraph 20 of the complaint are illegal.

17. Defendant United States denies any allegation of paragraph 21 of the complaint that contests the validity of the consent decrees. Defendant United States is without information or knowledge sufficient to admit or deny the remaining allegations of paragraph 21 of the complaint.

18. Paragraph 22 of the complaint is admitted.

19. Except as stated otherwise herein, defendant United States denies all other allegations of the complaint.

Respectfully submitted,

Wm. Bradford Reynolds
Assistant Attorney General

/s/ Charles J. Cooper
CHARLES J. COOPER
Deputy Assistant Attorney General
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[Certificate of Service, dated March 29, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

Motion of Defendant United States for Leave to Amend Motion to Dismiss and to Withdraw Motion for Summary Judgment

Defendant United States moves the Court for leave to withdraw its motion for summary judgment and to amend its motion to dismiss by deleting therefrom paragraphs 1, 2, 3, and 5. Said paragraphs assert (1) that plaintiffs' suit is barred as an "impermissible collateral attack" on the consent decrees entered in *United States* v. *Jefferson County*, C.A. Nos. 75-P-0666-S, 74-P-0017-S, 74-P-0012-S; (2) that plaintiffs' claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et. seq.*, should be dismissed for failure to file discrimination charges with the Equal Employment Opportunity Commission (EEOC); and (3) that plaintiffs' complaint fails to state a cause of action upon which relief may be granted. The United States thus seeks to retain only that portion of its original motion requesting dismissal of plaintiffs' claims under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. § 1221, *et seq.*) and the Omnibus Crime Control and Safe Streets Act of 1968, as amended (42 U.S.C. § 3376 *et seq.*) for failure to satisfy the statutory conditions precedent to suit.

As more fully discussed in the attached supporting memorandum, the assertion in the United States' Motion to Dis-

miss or Alternatively for Summary Judgment that the instant suit is barred as an "impermissible collateral attack" on the consent decrees is no longer tenable in light of the Eleventh Circuit's intervening decision in *United States* v. *Jefferson County*, 720 F.2d 1511 (11th Cir. 1982) [sic]. Moreover, there are genuine issues of material fact concerning, *inter alia*, the promotional practices of defendant City of Birmingham and the relative qualifications of promotional candidates. Accordingly, neither a motion to dismiss nor one for summary judgment against the plaintiffs can presently be maintained in light of *Jefferson County*.

Plaintiffs' complaint has been amended to aver that one of the named plaintiffs has filed a charge of discrimination with the EEOC and has received a "Right To Sue" letter. Since all of the other named plaintiffs appear to be similarly situated with the plaintiff who filed the charge, the statutory prerequisites for a Title VII suit have been satisfied.

WHEREFORE, the defendant United States requests leave to withdraw its motion for summary judgment and to amend its motion to dismiss by deleting all but paragraph 4 of the motion.

Respectfully submitted,

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Assistant Attorney General

/s/ Charles J. Cooper
CHARLES J. COOPER
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[Certificate of Service, dated March 29, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs,* v. RICHARD ARRINGTON, JR., *et al.*, *Defendants.*	CIVIL ACTION NO. CV 82-P-0850-S
WILLIAM L. GARNER, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 82-P-1461-S
BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs,* v. RICHARD ARRINGTON, JR., *et al.*, *Defendants.*	CIVIL ACTION NO. CV 82-P-1852-S

ORDER

Upon consideration of the motion of defendants John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas, and Charles Howard to consolidate, under Fed. R. Civ. P. 42 the above-styled cases with cases CV 33-AR-2166-S [sic] and CV 83-AR-2680-S, currently pending before Judge William A. Acker, it is hereby ORDERED that these five cases be consolidated for pretrial purposes, subject to further order of this court, and that the two cases pending before Judge Acker be reassigned to Judge Sam C. Pointer, Jr. before whom the three earlier-filed cases are pending.

This the 2nd day of April, 1984.

/s/ Sam C. Pointer, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S
WILLIAM L. GARNER, *et al.*, *Plaintiffs*, v. CITY OF BIRMINGHAM, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1461-S
BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S
PETER J. ZANNIS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2680-S

MOTION FOR CLARIFICATION AND RECONSIDERATION

Plaintiffs in *Wilks*, *Zannis*, *Bennett* and *BACE* move the Judges of this Honorable Court to clarify their respective Orders and the present posture of these cases in the wake of the Motion to Consolidate filed by Defendant-Intervenors Martin, et al., and, if necessary, reconsider the Order granting the Motion to Consolidate by The Honorable Sam C. Pointer, Jr., insofar as *Wilks* and *Zannis* are affected.* In support of this Motion, Plaintiffs show unto the Court as follows:

(1) On March 15, 1984, Defendant-Intervenors filed a Motion to Consolidate in each of five pending cases.

(2) On March 20, 1984, The Honorable William M. Acker, Jr., the randomly-assigned Judge overseeing *Wilks* and *Zannis*, entered Orders denying the proposed consolidation in *Wilks* and *Zannis*. In exercising his discretion in denying the Motion in *Wilks* and *Zannis*, Judge Acker ruled:

> Intervenors cannot be allowed, in effect, to control the litigation, particularly where the case has already been set for a pre-trial conference and where consolidation with several other cases would be likely to "unduly delay . . . the rights of the original parties," contrary to Rule 24(b) [of the Federal Rules of Civil Procedure].

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* Although *Wilks* was nowhere mentioned by name or case number in Judge Pointer's Order, Plaintiffs assume that the reference in the Order to Case "CV-83-AR-2166-S" was a typographical error and should have read "CV-83-AR-2116-S." If not, then this raises an additional need for clarification, especially in view of the care Defendant-Intervenors have taken to distinguish their Motion to Consolidate *Wilks* and *Zannis* with cases before Judge Pointer from previous motions by other Defendants to consolidate. The distinctions were based on the fact that the names of the cases sought to be consolidated were different, and this apparently distinguished the essential questions about consolidation from previously-rejected attempts at consolidation. *See also* Transcript of Oral Argument at 4 (March 30, 1984). Notwithstanding the need for clarification of this possible typographical error, Plaintiffs continue to believe that Defendant-Intervenors' Motion to Consolidate was unduly repetitious of prior motions in *Wilks* and *Zannis*.

Judge Acker further stated: "There is, however, no intention to rule on a motion pending in a case not assigned to [Judge Acker]."

(3) On March 30, 1984, Chief Judge Pointer held a hearing on the same Motion to Consolidate. At the hearing, Judge Pointer announced his intention to grant the Motion in its entirety, reassign the *Wilks* and *Zannis* cases to himself, and consolidate them for pre-trial purposes with *Bennett*, *Garner* and *BACE*. Judge Pointer entered an Order in *Bennett*, *Garner* and *BACE* on April 2, 1984 consistent with his intentions as announced at the March 30 hearing. Judge Pointer did not enter an Order in *Wilks* or *Zannis*. A copy of the transcript of the hearing is attached hereto as Exhibit A.

(4) Judge Pointer's April 2 Order appears to conflict directly with the prior Orders entered by Judge Acker in *Wilks* and *Zannis* on March 20, 1984. While Judge Acker ruled that *Wilks* and *Zannis* were not due to be consolidated with *Bennett*, *Garner* and *BACE*, Judge Pointer has ruled in the cases assigned to him that such a consolidation of Judge Acker's cases should be effected.

(5) At the March 30 hearing on the Motion to Consolidate, Plaintiffs and the United States took the position that a consensus or agreement to reassign the cases or consolidate between both Judges is required in order to grant the proposed consolidation. Transcript at p. 5, lines 7-19; p. 7, line 23; and p. 8, lines 1-2. Judge Pointer advised the parties that he did not believe the Judges were in disagreement on the matter:

"Judge Acker and I are not in disagreement." Tr. at 5, line 20.

> "I have talked with him . . . He [J. Acker] has no objection to my reassigning them and consolidating them if I want to."

Tr. at 8, lines 3-7.

(6) On March 31, 1984, the *Birmingham Post-Herald* reported that Judge Pointer had consolidated the cases pursuant to an agreement with Judge Acker:

> Pointer said yesterday that he and Aker [sic] had discussed the suits after Aker's [sic] ruling and agreed they should be consolidated, at least for the pre-trial proceedings. Pointer said it was determined that he would take them, in part because the first challenge was assigned to him.

Birmingham Post-Herald, March 31, 1984, p. A9 (copy attached as Exhibit B).

(8) On April 2, 1984, Judge Acker wrote a letter to all counsel of record in *Wilks* and *Zannis* advising that Judge Pointer claimed the newspaper report of a consensus is in error and there might be a misunderstanding between Judge Pointer and himself as to the substance of their agreement. A copy of such letter is attached hereto as Exhibit C. Judge Acker's letter states that he and Judge Pointer agreed on certain protocol in this Court, and that his "rulings in these cases [*Wilks* and *Zannis*] speak for themselves." The letter further states Judge Acker's understanding of the "protocol" of the Court that "gives each judge the right to rule on any motion pending in a case assigned to him, including a motion to consolidate . . . ." In addition, Judge Acker states, under Court protocol, that "*if* cases are consolidated they shall *thereafter* proceed as to the consolidated matters before the judge who has the oldest of the consolidated cases." (Emphasis added.)

Judge Acker nowhere said that he and Judge Pointer agree on whether their common understanding of protocol resolves the issue of consolidation. Moreover, his letter suggests that press statements of a joint Pointer-Acker decision to consolidate are inconsistent with the Acker rulings in *Wilks* and *Zannis*.

(9) Judge Acker's letter, despite its efforts at avoiding misunderstanding, has left Plaintiffs confused as to the Judge who will hear their cases and which Orders control. The letter suggests that there is no consensus or understanding between the Judges sufficient to allow Plaintiffs' cases to be reassigned to another Judge, and that, under Court protocol, Judge Acker had the right, as the randomly-assigned Judge, to rule on the motion to consolidate insofar as *Wilks* and *Zannis* were concerned.

While Judge Acker did not rule as to a consolidation of the three cases not before him, he unequivocally ruled on March 20 that *Wilks* and *Zannis* were not to be consolidated with any other case. Judge Acker's letter of April 2 reaffirms his prior Orders.

Judge Pointer, nonetheless, has entered an Order in the cases pending before him that is in direct conflict with the prior Orders of Judge Acker. The effect of Judge Pointer's April 2 Order may be to overrule Judge Acker's March 20 Orders in his cases.

Notwithstanding Judge Acker's statement that his "rulings speak for themselves," some clarification is needed from the Judges for the benefit of the Court, as well as counsel. Also, given Plaintiffs' fears that consolidation will delay adjudication of their rights, and prior Orders in their cases stating that consolidation would have that effect, the Judges should resolve the ambiguities arising from Judge Acker's letter and Judge Pointer's statements at the hearing on the Motion to Consolidate.

(10) Plaintiffs believe that Judge Acker's March 20 Orders are the law of the case as to *Wilks* and *Zannis*. Only if Judge Acker agrees to a modification of his prior Orders may his right to exercise his discretion in his cases be preserved in accord with the protocol of the Court vesting in each Judge the right to control the litigation randomly assigned to him under the rules governing the operation of the Court. Reasonable doubt and substantial question have been raised with respect to whether Judge Pointer has misunderstood Judge Acker's position as to the overruling of Judge Acker's prior Orders.

Therefore, Plaintiffs respectfully request the Honorable Judges to clarify their March 20, 1984 and April 2, 1984 Orders so as to reflect their agreement as to reassignment and consolidation. Without a clarification, Plaintiffs are faced with irreconcilably conflicting Orders from United States District Judges of equal authority.

(11) In the event a clear agreement and consensus on reassignment and consolidation may not be reached, Plaintiffs respectfully request reconsideration of Judge Pointer's April 2 Order. In addition to the reasons set forth in Plaintiffs' Answer

Opposing Defendant-Intervenors' Motion to Consolidate, Plaintiffs suggest that the April 2 Order, insofar as it affects *Wilks* and *Zannis*, impermissibly undermines the independent decision-making authority of a randomly-assigned Federal Judge in contravention of statute and the structure of the Constitution. *See* 28 U.S.C. §137; *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84 (1970) ("There can, of course, be no disagreement among us to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function."); *id.*, at 141-43 (Black, J., dissenting); *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100, 1103 (10th Cir. 1972) (Chief Judge's attempt to reassign cases to himself); *United States v. Heath*, 103 F.Supp. 1, 2 (D. Hawaii 1952) ("No express or implied power is granted chief judge to affect administratively, directly or indirectly, litigation assigned to and pending before another judge of district court.")

Reassignment is improper when the reassigning judge unilaterally designates himself to hear the case. *See Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 504-05 (1933). Construing the predecessor to 28 U.S. §137, which gave the Senior Circuit Judge power to divide business and assign cases to the District Courts over which he presided,* the U.S. Supreme Court criticized a Senior Circuit Judge who had assigned himself to sit in a particular case in a District Court involving appointment of receivers:

> All this shows that the situation was one in which the assignment of a judge to take charge of the receivership, if one was to be assigned, was a task which needed to be performed on careful consideration and with the utmost impartiality. The difference of opinion, between the Senior Circuit Judge and the District Judges . . . was not a proper

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* That statute was codified at 28 U.S.C. §27 and reads as follows:

> In districts having more than one district judge, the judges may agree on the division of business and assignment of cases for trial in said district; but in case they do not so agree, the Senior Circuit Judge of the Circuit shall make all necessary orders for the division of business and the assignment of cases for trial in said District; . . . .

> ground for taking the case away from the District Judge before whom it would ordinarily come, and bringing it before the assigning Senior Circuit Judge . . . . Had he reflected he probably would not have made such an assignment; but he acted hastily and evidently with questionable wisdom.

Id., at 505 (footnote omitted).

The Court indicated that the Circuit Judge's withdrawal would be the proper course:

> This action has embarassed [sic] and is embarassing [sic] the receivership. If he were now to withdraw from further participation in the receivership proceedings, the embarassment [sic] would be relieved; and the belief is ventured here, that on further reflection, he will recognize the propriety of so doing and, by withdrawing, will open the way for another judge with appropriate authority to conduct the further proceedings.
>
> *Id.*

In *Manhattan Railway*, the District Court had provided for assignment of cases seeking receiverships, and had a practice of appointment a trust company as receiver. A prospective plaintiff in such a suit, a transportation company, thought a trust company would not be adequate to manage its affairs. Through counsel, the Senior Circuit Judge was informed of this and agreed. Thereafter, the Circuit Judge designated himself as a District Judge pursuant to 28 U.S.C. §22, and then objected to the existing practice of that court for assignment of cases. Pursuant to his authority in 28 U.S.C. §27, he then assigned himself to the case.

The Supreme Court held that a subsequently-filed private suit, to which the judge was not a party, and which attacked the receiver appointed for the company, was not a proper vehicle to attack the judge's action. Then, the Supreme Court proceeded to add the above-quoted passages.

The next revision of the Judicial Code in 1948 removed the possibility of such a case occurring again. Congress revised

the provision, which became 28 U.S.C. §137, to provide for action by agreement to the extent possible. The new section omitted the power of a single judge to abrogate existing agreed procedures and claim the right to hear a particular case by virtue of residual authority to divide the court's business. *See Ritter*, 461 F.2d at 1103 ("[I]t is unquestioned that the division of the court's business is the responsibility of the judges and not the responsibility of the chief judge acting unilaterally.")

In this case, it is clear that the agreed method for assignment of cases in this District is the use of a random judge-selection process. No one has questioned this. *See Wilks*, Order at 2 (Dec. 13, 1983). *If* the case is proper for consolidation with other cases, *then* it is also agreed that the case is due to be handled by the judge with the first-filed case.

While one particular Judge, the Chief Judge, retains some residual power to assign cases in a manner consistent with the agreed rules, this power does not confer on him the unilateral power to determine that cases before different judges are proper for consolidation. The assignment of cases and their consolidation are distinctly different actions. *See Martinez v. United States*, 686 F.2d 334 (5th Cir. 1983); *United States v. Stone*, 411 F.2d 597 (5th Cir. 1972). Moreover, consolidation concerns the application of Article III power in evaluating the kinds of issues involved in separate cases and the effect on litigants of joining those issues for resolution. It would be inconsistent with the independence of the Federal judgeship to allow the Chief Judge of the District Court to overrule a randomly-assigned District Judge's evaluation of the propriety of consolidation of a particular case with others. *See, e.g., Ritter*, 461 F.2d at 1103; *Stone*, 411 F.2d at 498 ("Each judge of a multi-district court has the same power and authority as each other judge."); *United States v. Phillips*, 577 F.Supp. 879, 880 (N.D. Ill. 1984).

This is especially true here where Judge Acker deemed consolidation ill-advised because it would unduly delay adjudication of the rights of the parties in the cases before him. Judge Acker has already set the cases for a pre-trial conference and established a date for trial. His willingness to provide such expeditious consideration of the civil rights claims involved

should be respected. Plaintiffs should not be required to suffer the delay in adjudication that will inevitably accompany joining this suit with others. Whatever over-all economies that may accure [sic] to this Court from consolidation, Plaintiffs' right to a prompt hearing before a willing, randomly-assigned judge, counsels against reassignment of the cases before Judge Pointer.*

Nothing in Rule 42 purports to give a single judge in a multi-judge court the unilateral power to order consolidation of actions pending before another judge. All actions taken under its authority are actions by "the Court." Judge Acker's March 20 Orders make appropriate recognition of this insofar as they do not purport to rule on the motion to consolidate the cases pending before Judge Pointer. Any other ruling would have been inconsistent with the well-accepted notion that consolidation is a matter of discretion. In sum, the Court's power to consolidate actions before different judges confers no authority on an individual district judge to overturn another district judge's discretion against consolidation.

It begs the question to argue that *Wilks* and *Zannis* should have been assigned to Judge Pointer in the first place. While the cover sheets of this Court provide for indication from plaintiff's counsel of related actions, there had been no ruling by agreement of the Judges that any actions potentially related to *Bennett*, *Garner* and *BACE* were due to be assigned to Judge Pointer for ruling on consolidation. As such, the random selection rule should continue to operate, and do so, notwithstanding any lawyer's suggestion that cases are related and might be candidates for consolidation. Only *after* random assignment has occurred is the issue of consolidation to be resolved.**

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* The prospect of inconsistent rulings from the separate Judges is a possible problem, but not one that compels reassignment and consolidation. Differing rulings by Judges of the same District Court can be resolved by the appellate process if necessary. *See Wilks*, Order at 3 (Dec. 13, 1983); *1B Moore's Fed. Prac.* §0.402[1].

** Indeed, providing for automatic reassignment for ruling on consolidation may be improper. *Cf.*, *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 258-59 (1957) (mandamus proper to stop regular reassignment of cases to masters).

That issue cannot be resolved without Judge Acker's acquiescence. In the words of Judge Jones of the Fifth Circuit: "'When a cause is pending before a particular Judge of . . . a [District Court], such Judge for the time being has exclusive jurisdiction thereover . . . .'" *In re Brown*, 346 F.2d 903, 910-11 (5th Cir. 1965) (Jones, J., concurring), quoting *Buhler v. Pescor*, 63 F.Supp. 632, 639 (W.D. Mo. 1945), and citing *United States v. Heath*, *supra*.

Given Judge Acker's prior Orders and letter, it is imperative that Judges Acker and Pointer agree explicitly to reassignment and consolidation of *Wilks* and *Zannis* before Judge Pointer *or* that they acknowledge their Orders conflict, and therefore each case is due to proceed separately before the randomly-selected Judge.

In light of Judge Acker's letter, Plaintiffs believe they are faced with irreconcilably conflicting Orders on the same matter. Plaintiffs request that Judge Pointer and Judge Acker (1) clarify their respective prior Orders to reflect a consensus on the issue of reassignment and consolidation, and (2) if such a consensus is not present, then Plaintiffs request reconsideration of the April 2 Order.

Respectfully submitted,

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.

/s/ Albert L. Jordan
ALBERT L. JORDAN

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[Certificate of Service, dated April 5, 1984, and exhibits omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	CIVIL ACTION NO.
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CV 84-P-0903-S

ORDER

1. The motion of the plaintiffs in CV 82-P-0850-S, CV 82-P-1852-S, CV 83-P-2116-S, and CV 83-P-2680-S, filed April 5, 1984, is, upon consideration, GRANTED to the extent that the order dated April 2, 1984, is amended so that the reference to "CV 83-AR-2166-S" reads "CV 83-AR-2116-S." In all other respects, the motion is DENIED.

2. Pursuant to Fed. R. Civ. P. 42, the case of Johnny Howard v. City of Birmingham, et al., CV 83-P-3010-S, is hereby consolidated for pretrial purposes, subject to further order of this court, with CV 82-P-0850-S, CV 82-P-1461-S, CV 82-P-1852-S, CV 83-P-2116-S, and CV 83-P-2680-S.

3. A master case file for these consolidated cases is hereby established under the caption "In re: Birmingham Reverse Discrimination Employment Litigation," CV 84-P-0903-S. All pleadings, motions, discovery requests, discovery responses, and orders hereafter filed in these cases shall be filed in the master file and need not also be filed in individual case files unless they pertain uniquely to a particular case.

4. A pretrial conference will be held at 9 a.m. Monday, May 14, 1984, in the chambers of the undersigned for the purposes specified in Fed. R. Civ. P. 16 and 26(f). Counsel shall confer in advance of the conference and attempt to develop a mutually acceptable plan for conducting further discovery in this litigation. Subject to further order of the court, Raymond Fitzpatrick shall act as lead counsel for the plaintiffs in this

litigation and James Alexander shall act as lead counsel for the defendants in this litigation.

5. A copy of this order shall be filed in each of the constituent cases.

This the 12th day of April, 1984.

/s/ Sam C. Pointer, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S
WILLIAM L. GARNER, *et al.*, *Plaintiffs*, v. CITY OF BIRMINGHAM, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1461-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2116-S
PETER J. ZANNIS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2680-S

MOTION OF DEFENDANT-INTERVENORS
TO DISMISS AND FOR ALLOWANCE OF COSTS

Defendant-Intervenors John W. Martin, *et al.*, move to dismiss the Complaints in each of these consolidated actions on the following grounds:

1. Each of these actions is an impermissible attempt to reopen another case, relitigate the merits and destroy the validity of the judgment between the original parties.

2. Each of the complaints fails to state a claim upon which relief can be granted in that the only actions averred constitute lawful measures to remedy the effects of past discrimination and do not violate any legal rights of plaintiffs.

Defendant-intervenors ask that plaintiffs be ordered to pay defendant-intervenors their reasonable costs, including attorney fees, for their defense of each of these actions, upon the ground that plaintiffs' suits are frivolous and vexatious.

A memorandum of law in support of this motion is attached.

April 14, 1984.

Respectfully submitted,

/s/ Robert D. Joffe

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

MOTION OF DEFENDANTS RICHARD ARRINGTON, JR. AND THE CITY OF BIRMINGHAM TO DISMISS

Defendants Richard Arrington, Jr. and the City of Birmingham move to dismiss the complaints in *Bennett v. Arrington*, No. CV-82-P-0850-S, *Garner v. City of Birmingham*, No. CV-82-P-1461-S, *Wilks v. Arrington*, No. CV-83-P-2116-S, and *Zannis v. Arrington*, No. CV-83-P-2680-S, on the following grounds:

1. Each of these actions is an impermissible attempt to reopen another case, relitigate merits issues resolved or settled, and destroy the validity of the judgment between the original parties to the Consent Decree, entered on August 18, 1981.

2. Each of the complaints fails to state a claim upon which relief can be granted in that the only conduct averred therein involving these defendants consists of lawful measures required or permitted by the Consent Decree with the City of Birmingham, entered in No. 75-P-0666-S, No. 74-Z-17-S and No. 74-Z-12-S, which did not violate any legal rights of the plaintiffs.

3. These defendants adopt the arguments of the *Martin* defendant-intervenors previously submitted in support of their Motion to Dismiss these cases.

Respectfully submitted,

/s/ James K. Baker
James K. Baker

/s/ James P. Alexander
James P. Alexander
Robert K. Spotswood

Attorneys for Defendants
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and the City of Birmingham

OF COUNSEL:

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[Certificate of Service, dated April 25, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

CAPTION

Oral argument on motions coming on to be heard before the Honorable Sam C. Pointer, Jr., presiding judge, on the 14th day of May, 1984, at the United States District Courthouse, Birmingham, Alabama, beginning at 9:00 a.m.

APPEARANCES

Charles Cooper and William R. Wortham
Susan Reeves
David Whiteside and Mike Hall
James K. Baker, City Attorney
James T. Alexander
Steven Spitz and Robert D. Joffe
Robert Wiggins
Raymond F. Fitzpatrick
and others

Mayra B. Malone, RPR, CP, CM
Federal Official Reporter

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PROCEEDINGS

THE COURT: I ask counsel to please identify yourselves by name during the course of these proceedings. I ask this in view of the fact that there are a number of counsel that are not that familiar with myself or the court reporter. Has a proposed agenda been prepared by Mr. Fitzpatrick and Mr. Alexander?

MR. ALEXANDER: No, your honor, Mr. Fitzpatrick and I met on Friday with the thought of discussing the — pardon me. Jim Alexander. The thought of discussing the discovery plan. We concluded that while we each had some idea of what we wanted to do in that regard, that the court's ruling on the pending motions to dismiss would certain [sic] impact or perhaps shape the discovery that we had in mind and once that is disposed of, we would perhaps move on.

THE COURT: I will go ahead and directly and immediately address the pending motions to dismiss and for summary judgment filed in several of these cases. There is a lot of paperwork that has been filed with the court. I have read the briefs. I do not expect, desire nor will I permit oral argument other than that which may be needed to supplement matters that were not covered in the briefs.

Is there any additional matter that the movants

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have?

MR. JOFFE: Yes, your honor. Robert Joffe for the movants. I have a couple points we didn't make in our brief I would like to make.

First, on the issue of computation, one point we didn't make in the brief but which I would like to call the court's attention to is paragraph three of the Decree which makes it clear that the Decree makes a distinction between actions which are required and actions which are permitted. The language of the City Decree clearly doesn't support the government's position. Paragraph three expressly recognizes two classes of remedial actions and practices designed to achieve compliance with the Decree; those required by the terms of the Decree and those permitted to actuate and carry out the purpose of the Decree, and that is a point we make.

Another point I would like to make on the interpretation which we didn't make is the Personnel Board's Decree would be meaningless if the certifications that they are required to perform to people who were certified as qualified in the list of blacks and women, if they could not be hired even though they

were less qualified than their white counterparts, as long as they were qualified. You would

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have the situation where the Personnel Board was certifying long lists of people who then could not be hired. There would be no point in having the Board do that, which I guess is just another reason why —

THE COURT: Depending upon the interpretation of [the] phrase, "demonstrably less qualified."

MR. JOFFE: Yes, unless the City were permitted though to hire people who were demonstrably less qualified. As long as qualified, there would be no point in asking the Personnel Board to certify people in any order but in the order in which they are most qualified if the City didn't have the power to hire them.

Second, or on a different point than the interpretation, we have made a motion to dismiss. That is, our argument is that the allegations in the complaint, complaints, are not sufficient to even if true in any way impune [sic] the Decree. And I think that is correct, but I would like to make the — like to point out that the City has also moved for summary judgment and that means that the burden then is on the plaintiff to come forth and state those facts which if true would have impuned [sic] the Decree and none of the papers that have been put in by either the government or the plaintiffs have any additional facts been put in

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which if true would in any way cast doubt on the Decree. Your honor, of course, under 12 be allowed to treat the motion for summary judgment any way and the City has made such a motion and the facts have been put forth.

I should note that under the Williams case that if the private plaintiffs here had been allowed into the original Decree proceeding, the only thing that the Williams court would have allowed them to present evidence as to would have been the reasonableness of the Decrees as to themselves. It would not

have allowed them to try the whole discrimination issue, and I note the government in its papers takes the same position that even if they were allowed now to attack the Decree, they could not retry the discrimination, so the only issue which the private plaintiffs could have presented evidence on, had they been allowed into the Decree proceeding, would have been the reasonableness of the Decree as for themselves; that they have not even here alleged facts as to the unreasonability other than their per se attack on the quotas which clearly as a matter of law is insufficient. So I think again their complaints fail. If your honor were to find somehow that they have raised a factual issue, it seems to me that the only possible factual issue that they would be

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allowed to present evidence on would be the reasonableness of the Decree, as to themselves, and if your honor were to go in that direction, I would suggest that these proceedings then be consolidated with the Consent Decree proceeding but I think we have set forth in our papers why we feel that is not sufficient, it is not necessary.

And finally I would like to turn to two points. I would like to turn to the Miami-Kirkland point for a minute. In the City of Miami case, a collective bargaining agreement was involved. That is a very different situation here. The court relied there on the fact that these rights, the non-parties to the Decree were complaining, had been interfered with contractual rights with the City which the City itself had given them and bound themselves not to take away. That is not the case here. Here at best the rights are Alabama statutory rights and it seems to me that it is clearly that a consent decree is going to affect third parties in a variety of different ways and it is up to the federal court to decide as a matter of federal law which of those rights are so substantial they can't be interfered with and which of those rights can be interfered with in light of the paramount federal policy in the supremacy clause. The Kirkland court was faced with almost

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an identical situation and there the Second Circuit held that these kind of state statutory rights which were not inbodied [sic] in a collective bargaining agreement were not so strong that they couldn't be set aside by reasonable consent decree.

It seems to me that the very same arguments that are being made today were made to your honor at the fairness hearings and in fact the Fifth Circuit there had already granted rehearing in the Miami case and in your comments that you seem to recognize that that case was going to go off on the ground of a collective bargaining agreement.

The last issue I would like to turn to is the claim that, well, while we may not have an injunctive claim, the plaintiffs say we at least have a claim for damages, for pay. It seems to me the first point one must remember there is that for that claim to succeed, you still must show that the Decree is unreasonable. That is the foundation point, that the Decree goes too far, is in some way invalid. Nothing has been said in the pleadings here which suggests that the Decree is in any way invalid other than it takes race and sex into account. In other words, it is a per se attack and I think they would show

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it was insufficient. So I think the fundamental point is in myth.

The second point however though is that a claim for damages would completely undermine the relief here. The City would be, I think in the words of Justice Blackmon [sic] in his concurring opinion in the [Weber] case, on a high tightrope without a net beneath. Every time they made a decision they would be forced between complying with the Consent Decree and paying damages. It would be a very hard decision for the City to make. They would be faced with suits each time they made it, and the whole purpose of the Decree would be gutted.

In the Almarr Paper Company case the Supreme Court recognized the current effect of the suit was for damages. Of course, there was a case involving a suit by the minority but the court placed very much emphasis on the suit for damages that that would create. It seems to me that to allow such a deterrent

effect that would run concurrent to the Decree would cause a real undermining of the Decree.

Finally I would like to call the court's attention to a decision of May 3rd, 1984, by a district court in New Jersey, Judge Sarokin. Vulcan Pioneers, Inc., versus

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New Jersey Department of Civil Service. The United States was a co-plaintiff in that case. In that case, firemen had to be laid off in their collective bargaining agreement and the issue was whether the seniority system should be adhered to even if that meant gutting the Consent Decree that was in effect. Judge Sarokin said, yes, even though it was a collective bargaining agreement, that they should be laid— that they should be laid off and the seniority rights would fall. He said that the notion that the municipal government must compensate was absurd was the word he used for the reasons I said, but he went on to say if there was to be compensation the federal government should pay for it. After all, it is Title VII here that has caused this. It is a federal policy which is setting aside state contract rights. The United States government is one of the plaintiffs in the case and if anyone is responsible for compensating these people, it is the federal government. Thank you.

THE COURT: Anything other from the movants to supplement this?

(No response.)

THE COURT: Plaintiffs?

MR. FITZPATRICK: My name is Raymond Fitzpatrick

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representing the private plaintiffs. First of all, the movants simply failed to adequately address the Jefferson County opinion and without regurgitating to the court what is in our brief, the Jefferson County opinion does expressly reject the impermissible collateral attack doctrine on which the movants rely and rejects the cases on which the movants rely. The movants have alleged and asked this court to dismiss the cases

on the simple allegations of the movants that all of the challenged actions are mandated by the Consent Decree. Under that allegation alone they claim the court should dismiss these cases. That is wrong for two reasons. First, the cases allege actions which are not mandated by a lawful Decree. They allege that less qualified persons were promoted solely on the basis of race. Paragraph two says the Decree does not require the promotion on the basis of race. If it does not require it, it does not mandate it. The second reason is even if all of the defendant's actions are required by the Decree, that fact alone is not a shield to liability. The Jefferson County opinion stands for the proposition that the entry of the Consent Decree which may or may not affect third parties is of no conclusive effect to the rights of those third parties and for that reason it does not set the

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standard of conduct as to the parties to the Decree toward the — toward parties who did not consent to that standard of conduct.

We are complaining of practices, not violations of the Decree, which practices which are discriminatory and illegal toward the plaintiffs.

The Jefferson County opinion provides that individuals claiming what they call "reverse discrimination" are entitled to file individual suits.

THE COURT: I believe that this is regurgitation.

MR. FITZPATRICK: Okay. I will go to their supremacy clause now, if I may. They claim that the supremacy clause permits them by entry of a Consent Decree to invalidate enforceable rights of non-parties. The cases that they cite either involved litigated findings of discrimination or employees who did not have enforceable rights, and Arthur versus Nikas was a litigated finding. U. S. versus Chicago was a litigated case. Carter versus Gallagher was litigated. The Boston NAACP versus Beecher was litigated on the liability issue and the court expressly found that what was at issue was the power of the court in a litigated discrimination case to protect the relief that had already been achieved. The consent

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decree in Beecher was only as to the remedy and not as to the issue of liability. In Kirkland which Mr. — which the movants rely on, the collective bargaining agreement presented in that case expressly provided that the power to alter the promotional procedures was retained by the employer. Kirkland distinguished from City of Miami where the employer did not have that power. Here the employer does not have the power to alter the enforceable rights of the plaintiffs because the City of Birmingham and the Jefferson County Personnel Board are entities of limited authorities and the rights of the employees stem not from something that is granted by the municipality but something granted by the legislature.

The Miami case involved more than a collective bargaining agreement. First of all, the Miami case provides that the rights of the employees stem from Florida statutes which grant rights to the City of Miami and the civil service ordinance. The collective bargaining agreement simply provides that the prevailing laws in effect as the — on the date that the collective bargaining agreement is signed are not to be changed without the union's concurrence, but the rights of the employees stem not from the collective bargaining agreement but from the ordinance. Here the rights

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of the employees stem from a statute which in the same case — the defendants in this case do not have the power to alter. Arrington versus Associated General Contractors case affirms that. Finally the discrimination alleged is presumably litigious. We deal with that at roman numeral two in our brief, and the court, we submit, should consider our claims carefully after a full trial. Thank you, your honor.

THE COURT: United States is movant, opponent or partial movant.

MR. COOPER: Plaintiff, defendant. Thank you, your honor, Charles Cooper for the United States. We have a motion pending with the court to amend our motion to dismiss which we did not answer oral argument on I don't intend to

regurgitate anything in those papers. I would like briefly to respond to some of the points made earlier by counsel for the defendant intervenors and then make a couple of points that appeared now in their most recent filing last Friday.

First, with respect to interpretation of paragraph three of the Consent Decree, counsel is precisely correct it does make a distinction between those remedial actions required by the terms of the Decree. Just as paragraph

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two of the Decree makes that distinction and it goes on to say "or permitted." Permitted not, however, by the terms of the Decree, permitted — In fact, the only word that is modified, by the terms of the Decree, is the word "required." Or the question is permitted by what? Permitted by law outside the confines of the four corners of the Decree with respect to — so there is nothing at all inconsistent with that clause of the Consent Decree and the interpretation the United States has pressed. With respect to the distinction between a document, a decree that does not forbid conduct which this one clearly does not forbid the state, the city either from promoting lesser qualified blacks over better qualified whites or from promoting entirely unqualified blacks. Incidentally, your honor, on a point raised on Friday, the filings of Friday, there is nothing in these decrees that forbids the state, the city from promoting an unqualified black, an entirely unqualified black. Nothing in these decrees. The City cites languages. It says subject to the availability of qualified candidates or applicants. That is no more or no less than what is already provided in paragraph two. They need not meet their goal if there isn't — if there isn't a qualified candidate, just as paragraph two says. They need not

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promote an unqualified candidate. Paragraph two also says they need not promote a lesser qualified candidate.

Counsel suggests that the Personnel Board Decree becomes somehow meaningless under the United States' interpretation in this regard because it requires certifications without apparently respect to the qualifications of blacks or whites or

whether or not the black is qualified. The point, your honor, is that when these — when the Personnel Board Decree was entered, the system of certification was based entirely on test scores virtually and these tests were under a dark cloud at the time the Decree was entered. There was substantial foundation for believing that the test scores did not distinguish in a relative sense between qualifications and as long as the test scores were the only means by which individuals certified to the City, it was perfectly possible and indeed it was worded such that they had a profound disparate effect on blacks, so the simple requirement is that if you have — is to not hold the test scores in terms of relative qualifications but rather certify your best qualified as it were black candidate or female candidate and allow the City to determine based on competition superior qualifications as state law requires, who they will select. There is nothing inconsistent with

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the Personnel Board Decree. On the Miami-Kirkland point, counsel suggests that in Kirkland, the Court of Appeals for the Second Circuit said that state statutory rights are not so substantial that they can't be set aside by Consent Decree. In fact, your honor, the Court of Appeals for the Second Circuit said that the plaintiffs there had no state statutory rights that were in conflict with the consent decree. It distinguished City of Miami on that precise question. In the City of Miami, there was a municipal ordinance that accorded a right to promotional standing or place in the test takers in that contest. The only reason that the City of Miami couldn't exercise its otherwise broad power to change the system for promotions was that a collective bargaining unit agreement prohibited them from changing it. In Kirkland, there was no contractual provision that prohibited the New Jersey state civil service commission from — and these are the words of the court — "exercising its wide discretion to choose and modify the procedures it sees fit to determine merit and fitness." There was nothing in the consent decree, in the collective bargaining agreement there, that in any way interfered with the commission's ability to do that and therefore entering into an inconsistent consent decree or a consent

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decree under which they changed the qualifications for merit and fitness was in no way contrary to contractual rights.

Counsel also suggests that City of Miami and the Saveway Stores, W.R. Grace, that entire line of cases is limited to the context of the collective bargaining agreement. It is true that in each of those cases there was a collective bargaining agreement but the doctrine of those cases, we submit, your honor, is in no way limited to collective rights but it applies to any legally enforceable right and the language of those cases makes this clear. In Saveway Stores, page 579, if EEOC seeks a remedy which would infringe upon the rights of a third party on the rights, your honor, not collective bargaining rights, it cannot rely on its agreement with another party to do so. And another place in the opinion, if the EEOC — excuse me — enforcement of these agreements is not permissible as to those who have not consented to their provisions and who are prejudiced by their terms. Prejudiced, your honor, now the same is true of the City of Miami case. Where the enbanc [sic] court said, "A party potentially prejudiced by a decree has a right to judicial determination of the merits of its objection." These excerpts, your honor, would

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suggest a doctrine. Perhaps I [sic] don't understand what I am suggesting to you. I am suggesting to you there is no reason to distinguish between collective bargaining agreement rights and those rights that are legal enforceable but come from some other source. Here is state law, but even if contractual rights are somehow magic in this area, the State of Alabama, as we read the opinion, has interpreted the enabling rights and acts it envisions in public employees in the state who have no collective bargaining abilities as contractual rights.

With respect to Judge Sarokin's decision very recently, your honor, I merely ask that you read it and the answers will be self evident.

On the supremacy clause argument, counsel, I think, confuses the distinction between what it is that is required before

you have a validly entered and duly entered consent decree on the one hand and the fact on the other hand that that validly entered consent decree is entitled to the full of the supremacy clause protection but you have got first to decide the threshhold [sic] issue. And once it has been determined that the consent decree is valid and that the objections of the objectors are meritless or that the consent of those who have to consent has been obtained or

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that provisions that are not consented to have been purged of the decree, then, yes, the decree is entitled to supremacy clause protection. But the point we are making, your honor, is before it is entitled to supremacy clause protection, these cases, W.R. Grace line of cases, City of Miami, Saveway Stores, has to first be complied with then the supremacy clause attaches and — excuse me — inconsistent state law falls away. There is no case inconsistent with that proposition.

Finally, your honor, I am bound to make a couple of points in response to the rather rough language and harsh allegations made in the defendant-intervenors' filing Friday last. Allegations concern the United States' interpretation of these decrees and perhaps the United States' alleged lack of fidelity to previous interpretations —

THE COURT: I believe we can deal with that more adequately as I move to the question of at least a discussion on procedures dealing with the consent order, a motion that was filed in the other case.

MR. COOPER: Certainly, your honor, I am happy to deal with it at that time if your honor is saying we are going to deal with that today because I think —

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THE COURT: I am suggesting that I not deal with it right at this moment.

MR. COOPER: Your honor, may I not beg your indulgence to hear me out on a couple of points? These are most troubling.

THE COURT: Mr. Cooper, I am prepared to make a ruling on the motion for summary judgment and to dismiss. I would like to go ahead now and make that ruling.

I am going to deny the motion for summary judgment and to dismiss. In my view, there is a genuine issue of fact that is material to the outcome of each of these cases or may be. I do not believe that the cases can be dismissed on a motion to dismiss. I do think evidence could be adduced — I do not know whether or not it will be — that will present a claim or a question as to whether demonstrably less qualified blacks were promoted or hired in preference to demonstrably better qualified whites. As I view it, the Consent Decree does not require that action. As I also view and understand it, the Court of Appeals in its decision on the earlier appeal of the intervention questions and the base — or the Bennett decision has indicated that that type of preferential treatment not being required by the Decree may give rise to a claim of discrimination and I

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cannot on the basis of the materials before me determine that there is no genuine dispute about those matters. Now I do read, however, the Court of Appeals' decision apparently differently from what each of the three versions is that I have heard. I do believe that the Court of Appeals said there is no per se prohibition against an attack, indirect attack, in any event by a person whose rights may be affected during the implementation or claims implementation of the decree. To the extent the motions to dismiss or summary judgment take that position, I think the Court of Appeals said, no, that is not the law of this Circuit. I also disagree with the plaintiffs' position which uses other language of that opinion to indicate that if individuals have suffered as a result of the implementation of the decree, that they necessarily have a right to proceed since they weren't bound by or parties to that decree. I do not believe that is what the Court of Appeals said. The Court of Appeals said that presents a very difficult question and did not decide it. I am prepared to decide that if preferential treatment is mandated by the decree, then it constitutes a good defense but I cannot tell from the facts of the various cases whether this is true in one or

more of the cases and that would be a matter that will need development

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by discovery and by presentation. I do not view it as the United States' [sic] does, however, as being merely a tie-breaker situation. That is not the words either of the Consent Decree. The Consent Decree does provide an out in effect translating it or transferring it from mandatory to permissive where one is demonstrably better or less qualified. And as I view it those words have some significance and the mere — it is not merely a situation of whether there is on perhaps even a suggestive basis conclusion that one is better or less qualified but in order to get out of the mandated aspect of the Consent Decree, one must look to the question of whether there is a demonstrably better or less qualied [sic] and in that situation it changes it from mandatory to permissive and in turn, as I view and understand the Court of Appeals' decision, as well as making my own decision on the question that the Court of Appeals did not address, I conclude that there is that question open for resolution in these various cases and is on that basis that I am denying the motions to dismiss or for summary judgment and prepared to go forward to get on with this case, with the several cases. There is a lot of paperwork and there is very good briefing that has gone on. There is also a lot of paper that has been filed thus far in the motion to

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hold the United States in contempt, and I am sure if I let it go on I will get a long brief in response. I do not want to deal with that issue. The United States was obliged under the Decree to support the Decree against collateral attacks, both as to permissive and mandatory aspects of the Decree. In that sense I disagree with counsel for the United States' more narrow interpretation of that same Decree; however, that undertaking was done prior to the Court of Appeals decision and must be evaluated in the light of the Court of Appeals decision which as I view it has made a change in the law.

I do not believe the United States, as would be true with any other party, is obliged to take a position with respect to a matter of law that has been held to be not the correct statement of law. Now I have indicated I have some disagreement with the United States' position as it talks only about the tie-breaker and, as I view it, there is a broader area of mandated requirements under the Decree, but it is perhaps something the United States can deal with bearing in mind my ruling in the decision of its further position of this litigation.

Prepare now to go forward with the question of getting these cases ready for disposition, for determination.

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It doesn't appear to me that there are that many critical factual issues that are going to have to be resolved. That most of the matters are going to be one [sic] that are virtually susceptible of stipulation. I do not know the extent to which this is true. I do -- I am concerned that the work that is done from this point forward be done to get the cases ready for a decision and not to proliferate paper. I am not going to give any certification under 1292, for example, for interlocutory appeal, if that were requested. I am not going to deal with other matters that will present the Court of Appeals with an incomplete when they are called upon to review. We need to get these various cases and I think they can be done in a matter of month's time to the point of getting the facts outlined and, right or wrong in my decision about what I think the law is in line with the Court of Appeals' decision, we at least need to get that resolution of the trial court and then get an appeal perhaps from all parties but we need to go ahead and do that.

Now with that admonition, I am going to take a short break and I want Mr. Alexander and Mr. Fitzpatrick to talk a few minutes and see if there is not some way of moving forward on this litigation.

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MR. ALEXANDER: Your honor, just before your honor breaks, we had discussed the prospects of picking a particular

case. I guess I continue to have more input from that of the other side, but in terms of discovery which has been identified that we would be interested in doing, we would certainly want to depose each named plaintiff. There are a number of those. We have at earlier times scheduled some depositions. There [sic] have been somewhat time-consuming. Our experience would suggest that while the cases can be readied in a reasonably short period of time, that some meaningful discovery with respect to — from us, the named plaintiffs, what their qualifications, what they have heard, what they have said, so forth, so on from Mr. Fitzpatrick and his colleagues, deposition of "decision-makers" which I would assume include a chain of command from first level supervisor to the appointed authority of the Mayor, if I mistake that, I can be corrected, but because some of the discovery in some of these cases where we have got six or seven or eight or nine named plaintiffs, we do have a good bit to do and I think we can do it expeditiously but it is not — I think perhaps the court overstates when it states it can be ready in a month's time.

THE COURT: I had assumed that counsel had already

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and were engaged in some discovery up to this point and perhaps there would not be perhaps that much more needed. That was my assumption when I said a month's period of time.

MR. ALEXANDER: Your honor, we have engaged in some discovery and scheduled additional discovery but concluded it needed additional —

THE COURT: I am not irritated at that. I can understand.

MR. FITZPATRICK: As far as the idea of getting one case ready, the cases coming out of different departments present different factual contexts and I think it would be a good idea for the court to have these different opportunities together so if it goes up, it goes up together.

THE COURT: That is the concern I have because I can imagine a situation which I based on my interpretation of the

law might rule that there had been failing on the part of the City in or with respect to one case, that there was something that was not required by the Decree, and that it was a discriminatory act, in the other cases it was required by the Decree and based on my interpretation, that was permissible. I think the Court of Appeals ought to have at least if not all of the cases a full range of that kind

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of situation so it will have to wrestle with the same problem.

MR. ALEXANDER: In that regard, your honor, I think and without consulting with my colleagues that we can speak in terms of a schedule that will occupy a good part of the summer and I am just, for example — I think it would be — this is based on the experience of the two day deposition. There are lots of parties and lots of folks that have vigorous interests and it is going to take a concerted effort to get these cases ready where perhaps the live testimony could at least possibly be reduced.

THE COURT: It may take that long.

MR. FITZPATRICK: I think if Mr. Alexander's analysis of perhaps a better part of the summer is correct and if we look toward a hearing either late August or early September, that that — if we went forward immediately and began working, I think we could present the court with a good, clean, quick trial where we had things boiled down to the point I think that the court would like to see. I know Mr. Wiggins has been joined in with us and I don't know much about his case, but I know he wants to engage in some discovery as well. I think he only has one other party in this case. We haven't had any motions to intervene there

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but—

THE COURT: Incidentally let me say this: There was no motion as far as I am aware of by the Personnel Board in these cases. Had there been one, I probably would have granted it. I am not sure that there is any real claim in these cases

against the Personnel Board but they may be needed to remain in the litigation in order to be bound by it.

MR. WHITESIDE: Your honor, we are trying to stay out of it but at the same time our interests are vitally affected in this case.

THE COURT: I gather that is true. I was just saying that from my interpretation there are not any charges that I would say the Personnel Board is doing anything in violation of the law as I understand it.

MR. FITZPATRICK: For purposes of further appeal, keeping them in here would therefore let us all go up together. As far as the actual discovery, I think a lot of that comes down to the question of cooperation between all counsel concerned and I know that Mr. Alexander is an easy person to get along with.

MR. ALEXANDER: Just wait.

MR. FITZPATRICK: I would think that if we could

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resolve a lot of these discovery issues informally we would be able to move this matter along.

MR. ALEXANDER: Your honor, I think we can work out a schedule. There is a question of Mr. Coleman's case.

THE COURT: Let me make a comment on that. The more I have thought through what is involved, the more I am convinced there cannot be a class action on behalf of the plaintiffs because it is of necessity, as I understand the law, going to involve in each and every case, if I am correct on the law, a matter of evaluating a white male plaintiff's position vis-a-vis a particular black male situation and in a very localized situation and I just don't see how there is any way that this case is going to accommodate a class action under the law as I view it. Now if I viewed the law differently, then, yes there could be a class action, but given my indication of the need to focus on the particular qualifications, if you will, I just don't see that that is going to lend itself to any class situation.

MR. ALEXANDER: Mr. Coleman's case needs to be in the pot though because I think his plaintiff involved someone who was directly affected by an individual named in the Consent Decree as being entitled to special consideration.

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THE COURT: I think the individual plaintiff that is in Mr. Coleman's case is the one that needs to go ahead and needs to be developed because it does present a somewhat different and important aspect of this litigation and needs to have a resolution for review at the same time as these other questions. I guess one thing I am really saying is although ordinarily certainly one should go forward rapidly to determine whether a class action should be maintained, I really don't want the parties to get bogged down in that when I don't think the case is going to end up as a class action. Similarly there is some — intervenors-defendants came in asking for a class to be certified for the defendants and amended pleadings seeking class determination was filed. Then we have these motions for discovery that go into the inquiry against the individual defendants and their entitlement to be a class representative and the like. Again, I think this is only going to slow down unnecessarily and unfruitfully the resolution of these cases and I really do not see the necessity for it and I think we are going to waste time unnecessarily on this matter.

MR. COLEMAN: Your honor, then we won't take any steps toward that end.

THE COURT: That should my view. If I am right on

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the law, I think I am right on the class action situation.

MR. COLEMAN: It is the practice though, your honor, that is what we were thinking of. Taking the demonstrably less qualified is a policy the City has followed.

THE COURT: It is but there is no way of ascertaining who is or who would be adversely affected by that except in the light of particular situations and it is not like all those who took a particular test. As a matter of fact, one client is simply one

individual and at least as I understand I don't think you would be able to represent but a very limited class. We can go around and start searching for other named plaintiffs but that this is a proliferation unnecessarily.

MR. FITZPATRICK: Your honor, I think you touched upon the intervenors' answer with regard to their class and we can propound questions to them with respect to that.

THE COURT: That isn't going to do a thing in this case except waste time.

MR. FITZPATRICK: I had to deal with the allegations.

THE COURT: It might make sense if we really needed a class for the defendant.

MR. FITZPATRICK: If they are willing to waive

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their class claim, then there is nothing to question them about it.

MR. JOFFE: That is entirely satisfactory with us.

MR. FITZPATRICK: As far as their individual rights or their individual interest, for instance. I gave them a question with respect to what they know about the plaintiffs and they refused to answer that. I am just searching for what facts they hold that may be admissible and as far as their —

THE COURT: This case is going to turn on the question of what the City did and it affects your relationship to other terms. It is going to turn on whether there are good class representatives or the like, what their individual situation is. They are in here really to defend the Decree. Seeing that the United States was not one that was totally to be trusted, at least from the standpoint of their viewpoint, but I think that is really where their position is and to assist and work with the City as they were bound to do so under the Decree to protect the Decree and the rights under the Decree of their class members there, but they may do that just as well by operating in an individual capacity here and attacking your evidence or developing other.

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MR. FITZPATRICK: I just was concerned about liability to seek knowledge of what evidence they have or what —

THE COURT: Certainly they would be required to make a disclosure of any evidence they would put on or cause to be put on.

MR. FITZPATRICK: I think I did propound questions to them which went to that and I filed a motion to compel and perhaps that hasn't been —

THE COURT: I think that matter can best be dealt with when you and Mr. Alexander talk with other counsel and you arrange the schedule on completiton [sic] of the discovery and listing the documents and the witnesses you will have and they will certainly be involved in that schedule.

MR. JOFFE: Your honor, our only objection to that particular question was we didn't have any discovery in and we didn't know what our discovery was. We have no objection to giving them more discovery before a hearing.

MR. ALEXANDER: Your honor, I have got some trial commitments in Montgomery this week but I would expect by early next week Mr. Fitzpatrick and I could have a schedule of what we expect to be done. I wonder if it might be appropriate toward the end of June or perhaps early July to have a status conference to indicate how far we have gone,

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what additional work needs to be done to determine perhaps a setting in the fall.

THE COURT: That certainly would be fine. It seems to me it would make some sense. I do suggest this: that at that conference, as would be true at any depositions or the like, that counsel, at least any counsel who may ultimately be seeking fees from somebody else in this litigation, need to exercise restraint. I would not anticipate awarding fees if that ends up being correct for more than two parties. I am talking about two attorneys who essentially have the same interest to be involved

in the same conference or deposition. That is just unnecessary hours being spent, so it is not to say you have to be more restricted. It is just to say if you are talking about any fees that is the limit, unless there is something highly unusual that would require more than two persons.

MR. FITZPATRICK: Your honor, one other discovery matter which I would anticipate a problem and which came up last year on the Tony Jackson matter is Mr. Alexander made a reference to everybody from the first-line supervisor up as being a decision-maker and as you may remember that caused some problem last year because I have a lot of union members who viewed themselves as on our side, so to

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speak, and they wish to talk to me. They hold facts which may be relevent [sic] for presentation and Mr. Alexander has got department heads who have been obviously City management personnel, but I am not sure that the way the City is set up anybody below that is in a confidential relationship. Now we did ask the Alabama State Bar for an opinion about that and we had a rather vigorous exchange of authority saying — I called Mr. Morrow and I reminded him of that and he told me that he had a lot of work to do. So I need some protection but yet I do have people who want to talk to me.

MR. ALEXANDER: I think your honor has previously indicated that the court is going to look on that ad hoc, so to speak. That does not of course foreclose me or my client from pressing the matter before the Bar association. This is a matter of great concern to both sides and for all obvious reasons.

THE COURT: Well, you are correct. I have indicated that I was not going to lay down the ethical standards in this litigation. I am really for the most part assuming subject to whatever the State Bar may conclude about it that a person has the right to choose whom he considers as his or her attorney. And that in that light, if there

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is a person who has a dual role, that person is entitled in effect to choose sides. That is not at the same time to say that one who has powers over such an individual may not impose appropriate sanctions as an employer, for example, for an employee who fails or refuses to cooperate. Again I am not making a decision on whether that is permissible or not. I am sure that you are familiar with a number of cases in which that kind of problem has come up of failure to cooperate with one's employer, but in terms of stopping the discovery I am not going to interfere.

MR. FITZPATRICK: It is a problem though that would probably come up as we go into discovery and I wanted to raise it at this time. I will remind Mr. Morrow of our request.

THE COURT: I would hope that counsel might also make some disclosure about what you would hope to prove from some of these persons, and it may be that you will find that you can agree that their testimony would be of a certain tenor without the need to go forward on that. And it may be that you can restrict and limit the number of persons who really have to be deposed in this area. I would certainly hope so.

MR. FITZPATRICK: If I had access to them, it would

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reduce that need for deposition.

MR. ALEXANDER: I suppose your access is at our peril. I don't understand why my batallion [sic] chiefs should be your witnesses. It is that simple.

MR. FITZPATRICK: I like what they say. Thank you.

THE COURT: Let's see if we can — yes?

MR. COOPER: Your honor, Charles Cooper again, the United States. I assume that we are not going to take a break and come back after all this?

THE COURT: That is correct.

MR. COOPER: If I may say a couple of things. First, we are certainly welcome to the court's obvious commitment to

getting these cases ready for trial with a minimum of extraneous skirmishes. May the United States proceed on the notion that the motion to amend our motion to dismiss is based in light of your remarks either is or will be granted?

THE COURT: It is. That will be granted. However, I should say I think the plaintiffs have acknowledged that there are two theories of action that for lack of administrative exhaustion are not before the court. That doesn't really change matters. The Safe Streets.

MR. COOPER: With respect to that, we did not seek

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to amend that part of our motion.

THE COURT: You may also assume that I am denying the motion for contempt in this case. And if there is a need to do something later down the track and renew the motion for contempt, I will look at it again. At least at this point, I am not going to schedule the motion for contempt in the Jefferson County case and instead will just sort of wait and see if the United States does live up to its commitment in the light of changed case law.

MR. COOPER: Your honor, in that regard, the United States would say here what we said in Judge Acker's court after we had been invited to intervene in that matter. The United States has every intention of vigorously defending the validity of the Decree and all of the relief required by the Decree, your honor, we have not taken one false step from that commitment and that obligation.

THE COURT: That is a matter that obviously is debatable.

MR. COOPER: It obviously is, your honor, but that is —

THE COURT: I think I have indicated that I am generally in accord with many of the positions, although I disagree with the tie-breaker that it is that narrow.

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MR. COOPER: No matter what our duty to defend is, it isn't to ask of the defendant-intervenors and the City to put an extra signature line on their documents.

THE COURT: I think it would have been except for the Court of Appeals' decision.

MR COOPER: Well —

THE COURT: I think you are certainly off the hook, if you want to put it that way.

MR. COOPER: Beg your pardon?

THE COURT: I think you got put off the hook by the Court of Appeals.

MR. COOPER: Had that not been done, we would not have moved a motion to dismiss. We in fact argued and won that case in that circuit and won on the positions on briefs that bear my name, so we recognize a difference in circuits when there is one and if we were in the Fifth Circuit, we would join in the motion to dismiss.

MR. ALEXANDER: Perhaps we will get this moved, your honor.

MR. COOPER: There is one other point, your honor, if I may beg the court's indulgence. When we acknowledged our glad acceptance of Judge Acker's invitation to participate in the Wilks and Zannis matters, we confessed to Judge

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Acker that we had not done — had not been able to at that point in time the kind of factual investigation that one must do consistent with Rule 11. One can file a complaint. Based on our interventions as nominal parties plaintiff as we made clear to Judge Acker on the simple fact that if in our view the allegations or some of them anyway in the complaint were made clear at trial and we are approved, then in fact we thought they would make out a case of unlawful conduct. Judge Acker allowed us until June 15th or the close of that discovery schedule in his court — he had just set a discovery schedule — to file a com-

plaint. We are a little bit unclear as to where we stand in that regard. Now the cases have been consolidated.

THE COURT: You may want to file a complaint or answer depending on which side you end up taking.

MR. COOPER: Absolutely, your honor, absolutely until the close of discovery.

THE COURT: Not until the close of discovery, until further discovery has occurred that allows you to determine the ultimate position you take on the facts of the particular case.

MR. COOPER: Very well, your honor, and it may be complaints and answers will be filed. Thank you sir.

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THE COURT: Is there anything else?

MR. JOFFE: Your honor, the only question I have is do I understand that the issue which you have said is the principal issue of the trial is whether demonstrably less qualified blacks have been hired in preference to more qualified whites and that in essence is the factual issue?

THE COURT: That is the factual issue as I see it in the context of these particular cases. As I said, whites and blacks. We have got a male and female case. I don't think other than Mr. Wiggins' case we have another male-female case because it wouldn't be able to be in under 1981, I suppose, and I don't know that there are any Title VII claims other than Mr. Wiggins' case involving male and female.

MR. FITZPATRICK: Some of the police officers have that in there.

MR. JOFFE: In essence, your honor, saying it is not open as an issue as to whether the decrees are per se unlawful or whether the decrees are unlawful in some other ways. You seem to be saying that you will hold that the decrees are unlawful.

THE COURT: That is correct. That is an issue, as

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I view it, the Court of Appeals did not decide but then it still is a question of lawful in the sense that the mandated aspects of the Decree may be carried out without liability. As I understand the Court of Appeals' decision, that is a permissible conclusion to be reached with their decision.

MR. ALEXANDER: Your honor, with respect to the issues that we have to deal with, one concern I have is the extent to which the Personnel Board's testing procedures will bear upon and the Personnel Board's practices will bear upon demonstrable qualifications. That is obviously a broad and complex issue and I am not certain if it is one that we can avoid.

THE COURT: I don't know. I recognize the problem. The Decree is not definitive in terms of what is a job selection procedure that is job-related. Whether it is limited simply to such things as tests or whether it may include some other matters, and it does include tests, to whatever extent this involves the inquiry into the Personnel Board test. We also have the problem we have had before about demonstrably better qualified and the Personnel Board in its brief sometime back addressed that very same point with respect to the propriety or impropriety of using SEM's or SED's in that question.

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MR. JOFFE: My concern along the line is if the plaintiffs for instance put in the fact that they have a particular white that had a three point higher test score than a particular black and as far as they are concerned that proves that the white was demonstrably better qualified than the black, we will be in the position not only of saying of course the three points doesn't prove anything but that the test itself is not job-related and if that is the case, it may be very difficult to get this case ready for trial by September.

THE COURT: It may be and I think that is one area in meeting again in late June that will have to be gone into after you have moved on forward a little bit better with the other discovery.

Other comments or questions?

(No response.)

THE COURT: All right. Thank you very much.

[Certificate omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

MOTION OF DEFENDANTS
RICHARD ARRINGTON, JR.
AND THE CITY OF BIRMINGHAM
FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56, Federal Rules of Civil Procedure, defendants Richard Arrington, Jr., and the City of Birmingham (hereafter collectively the "City") move the Court to enter partial summary judgment in their favor and against each of the plaintiffs in these consolidated cases to the extent that their claims of unlawful reverse discrimination are predicated upon (1) the results of written tests administered by the Jefferson County Personnel Board (hereafter "Board") as a prerequisite to consideration for promotion to positions with the City and (2) rank on an "Eligible Register" prepared by the Board. There are no genuine issues of material fact and the City is entitled to partial summary judgment as a matter of law.

This motion is based upon: (1) the Consent Decree With The City of Birmingham ("City Decree"), (2) the Consent Decree With The Jefferson County Personnel Board ("Board Decree"), (3) the Response of the Personnel Board of Jefferson County to the First Request for Admissions From Defendants Richard Arrington, Jr., and the City of Birmingham ("Board Response"), (4) the Answers and Objections of the City of Birmingham and Richard Arrington, Jr., to the First Continuing Interrogatories From the United States ("City Answers"), (5) the Personnel Board of Jefferson County, Alabama, Rules and Regulations as Revised July, 1979 ("Board Rules"), attached hereto as Exhibit 1, (6) the Affidavit of W. Gordon

Graham, attached hereto as Exhibit 2, (7) the Affidavit of John L. Duncan, attached hereto as Exhibit 3, (8) the Affidavit of O. Neal Gallant, attached hereto as Exhibit 4, and (9) the Affidavit of Arthur V. Deutcsh, attached hereto as Exhibit 5.

Under paragraph 2 of the City Decree, the City may exercise a right not to "promote a less qualified person, in preference to a person who is demonstrably better qualified based on the results of a job related selection procedure." Relying on this provision, plaintiffs assert that the City was not compelled to promote blacks or females who scored lower than competing whites or males on written promotional tests administered by the Board or who ranked lower on the Board's "Eligible Register." The Register is a "record containing the names of those persons who have successfully completed prescribed tests, listed and ranked in order of their final earned average from the highest to the lowest and are considered qualified for original appointment to positions in the class for which the test was held." (Board Rules p. 51) Rank on the "Eligible Register" is determined by the Board's practice of adding to the raw score obtained by an individual who has passed a promotional examination "one point for each year of full-time employment in the classified service up to and including twenty years." (Board Rules 3.8(i)(2); Board Response No. 101)

Acceptance of plaintiffs' theory would necessitate resolution of the complex issues pertaining to the validity and/or rank-order validity of the Board's tests and selection procedures, which vary materially with each position at issue. The City, however, asserts a dispositive defense. The City does not possess the test scores of competing candidates or the "Eligible Registers." The City cannot, and does not, exercise any rights it may have under paragraph 2 of the City Decree on the basis of such information. Plaintiffs' claims, to the extent they are predicated in whole or in part upon test scores or rank on an "Eligible Register," must fail.

* * *

[Certificate of Service, dated December 21, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

MOTION OF DEFENDANT-INTERVENORS FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56, Federal Rules of Civil Procedure, defendant-intervenors John W. Martin, Major Florence, Ida McGruder, Sam Coar, Eugene Thomas and Charles Howard move the Court to enter partial summary judgment in their favor against each of the plaintiffs to the extent that plaintiffs' claims against defendants Richard Arrington, Jr. and the City of Birmingham (collectively, the "City") are predicated upon (1) the results of written tests administered by the Jefferson County Personnel Board (the "Board") as a prerequisite to consideration for promotion to positions with the City and (2) rank on an "Eligible Register" prepared by the Board. The City made a similar motion on December 21, 1984. The City and defendant-intervenors are entitled to partial summary judgment as a matter of law.

Plaintiffs claim that they are better qualified for certain promotions to positions with the City than are blacks and females who received those promotions and that they therefore have a right to those promotions. They apparently believe that results of the Board's written tests and rank on the Board's Eligible Register are material to that claim.

Contrary to plaintiffs' position, however, and in support of defendant-intervenors' position that neither Board test results nor rank on an Eligible Register raises a genuine issue as to any material fact, defendant-intervenors show the Court as follows:

1. The Consent Decree With the City of Birmingham (the "City Decree") provides a complete defense to any claim challenging the promotion of a qualified black or female in good faith compliance with the goals of the decree. Although plaintiffs have argued that paragraph 2 of the City Decree withdraws that defense in any case in which a qualified black or female is promoted in preference to a "demonstrably better qualified" white male, that interpretation of paragraph 2 is illogical, would nullify the purposes of the City Decree and is inconsistent with the understanding of the parties at the time the decree was signed and approved.

2. Even if the City Decree provided no defense in the circumstances of this case, plaintiffs could still not rely on Board test results or rank on an Eligible Register in trying to make out their claims. The City is not legally required to consider such data, which is not made available to it as a matter of Board policy. There is no evidence that the parties to the City Decree intended to modify that practice. Accordingly, any claim predicated on the City's use or misuse of such data must fail.

WHEREFORE, defendant-intervenors request the Court to enter an order granting partial summary judgment in their favor and against each of the plaintiffs in these consolidated cases to the extent that their claims are predicated upon (1) the results of written tests administered by the Board as a prerequisite to consideration for promotion to positions with the City and (2) rank on an "Eligible Register" prepared by the Board.

December 31, 1984.

Respectfully submitted,

/s/ Robert D. Joffe

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[Certificate of Service and attachments omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S
JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*. UNITED STATES OF AMERICA, *Plaintiff-Intervenor*.	CIVIL ACTION NO. CV 82-P-0850-S

COMPLAINT IN INTERVENTION

The United States of America, plaintiff-intervenor, by William French Smith, Attorney General, alleges:

1. This complaint is filed by the Attorney General on behalf of the United States to enforce the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972); to enforce the nondiscrimination provisions of the State and Local Fiscal Assistance Act of 1972, as amended (31 U.S.C. § 6716); and for the purpose of protecting and enforcing rights guaranteed by the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §§ 1981, 1983.

2. The Court has jurisdiction of this matter pursuant to 42 U.S.C. § 2000e-6, 28 U.S.C. § 1345, and 31 U.S.C. § 6720.

3. The *Bennett, et al* v. *Arrington, et al.*, CV 82-P-0850-S, action was commenced by James A. Bennett *et al.*, on April 4, 1982. The *Wilks, et al.* v. *Arrington, et al.*, CV 83-AR-2116-S, action was commenced by Robert K. Wilks *et al.*, on September 7, 1983. On April 2, 1984, these actions were consolidated with other actions under *In Re: Birmingham Reverse Discrimination Employment Litigation*, CV 84-P-0903-S. Since and before April 2, 1984, other individual members of the Birmingham Fire and Rescue Service have sought and have been granted leave to intervene in these cases as plaintiffs.

4. Plaintiffs are all residents of Jefferson County, Alabama, and are over the age of twenty-one years.

5. Defendant City of Birmingham is a political subdivision of the State of Alabama and an employer within the meaning of 42 U.S.C. §2000e(b), as amended.

6. Defendant Richard Arrington, Jr., is Mayor of the City of Birmingham and is responsible for the administration and operation of the city government of Birmingham, including the hiring, assigning, and promoting of employees of the City.

7. Defendant Jefferson County Personnel Board is an agency of Jefferson County established pursuant to the laws of the State of Alabama (Act. No. 248 of the 1945 Alabama Legislature, as amended, hereinafter referred to as the "Enabling Act"), and is an employer within the meaning of 42 U.S.C. § 2000e(b). Defendant Jefferson County Personnel Board is engaged in the procuring and screening of applicants for promotion, in the certification of eligibles for promotion to the defendants named in paragraphs 5 and 6, and is further engaged in the administration of a civil service system for such defendants.

8. Plaintiffs are all white, male employees of the Birmingham Fire and Rescue Service of the City of Birmingham. Pursuant to the provisions of the Enabling Act, the plaintiffs all have applied for, and taken examinations for promotion to the classifications of Fire Lieutenant and/or Fire Captain of the Birmingham Fire and Rescue Service.

9. The defendants enumerated in paragraphs 5 and 6 have received revenue sharing allocations from the United States Treasury pursuant to the nondiscrimination provisions of the State and Local Fiscal Assistance Act of 1972, as amended (31 U.S.C. § 6716 *et seq.*).

10. Defendants City of Birmingham and Richard Arrington, Jr., have pursued and continue to pursue policies and practices that discriminate against white males and that deprive or tend to deprive white males of employment opportunities in the promotional positions of Fire Lieutenant and Fire Captain because of their race. Defendants implement these policies and practices, among other ways, as follows:

a. By following a practice of promoting black firefighters and Fire Lieutenants in the Birmingham Fire and Rescue Service in preference to demonstrably better qualified white firefighters and Fire Lieutenants.

b. By promoting black candidates to Fire Lieutenant and Fire Captain over white candidates exclusively on the basis of race and without regard to relative qualifications.

c. By refusing or failing to take appropriate action to eliminate discrimination against white, male employees certified as eligible by the Jefferson County Personnel Board who were and are seeking promotion to the positions of Fire Lieutenant and Fire Captain in the Birmingham Fire and Rescue Service.

11. In accordance with Section 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-6, the United States, through the Department of Justice, has investigated the employment practices of the defendants and has attempted to eliminate the policies and practices described in paragraph 10 above and has attempted to eliminate those policies and practices through negotiation and settlement.

12. The policies and practices of the defendants, described in Paragraph 10 above, constitute a pattern or practice of resistance to the full enjoyment by white males of their right to equal employment opportunities without discrimination based upon race. This pattern or practice is of such a nature and is intended to deny the full exercise of the rights secured by Title VII of the Civil Rights Act of 1964, as amended, and is in violation of the obligations imposed by the State and Local Fiscal Assistance Act of 1972, as well as rights guaranteed by the Fourteenth Amendment to the Constitution of the United States and by 42 U.S.C. §§ 1981 and 1983. Unless restrained by order of this Court, the defendants will continue to pursue policies and practices the same as or similar to those alleged in this Complaint.

WHEREFORE, plaintiff-intervenor prays for an Order permanently enjoining the defendants, Richard Arrington, Jr. and the City of Birmingham, their officers, agents, employees, successors, and all persons in active concert or participation with them from:

(a) promoting black firefighters and Fire Lieutenants in preference to better qualified white firefighters and Fire Lieutenants;

(b) failing to make compensatory payments, to award retroactive seniority, and to award future promotional priority to rejected white promotional candidates who have been victimized by the practices described in paragraph 10 above; and

(c) failing to take other appropriate measures to overcome the present effects of past discriminatory policies and practices.

Plaintiff-Intervenor prays for such other additional relief as justice may require, together with its costs in this action.

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[Certificate of Service, dated January 14, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S

MOTION OF UNITED STATES TO REALIGN AS PARTY-PLAINTIFF

The United States of America respectfully moves the Court for leave to realign as a party-plaintiff in *James A. Bennett, et al.* v. *Richard Arrington, Jr., et al.*, CV 82-P-0850-S.

A Memorandum in support of this Motion and Certificate of Plaintiffs' Counsel are attached hereto and incorporated herein.

WHEREFORE, the United States prays that its Motion be granted.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
ROBERT W. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2116-S

ANSWER AND COUNTERCLAIMS OF DEFENDANT INTERVENORS JOHN W. MARTIN, MAJOR FLORENCE, IDA MCGRUDER, SAM COAR, EUGENE THOMAS AND CHARLES HOWARD TO THE COMPLAINT IN INTERVENTION OF THE UNITED STATES

Defendant-intervenors, John W. Martin, Major Florence, Ida McGruder, Sam Coar, Eugene Thomas and Charles Howard (the "Defendant-Intervenors") for their answer to the complaint in intervention of the United States of America in CV-83-P-2116-S (hereinafter "complaint") answer as follows:

FIRST DEFENSE

The complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

The complaint constitutes an impermissible collateral attack upon the "Consent Decree With The City Of Birmingham"

entered by this Court on August 21, 1981, in Civil Action Nos. 75-P-0666-S, 74-Z-17-S and 74-Z-12-S ("City Decree").

THIRD DEFENSE

The complaint constitutes an impermissible collateral attack upon the "Consent Decree with the Jefferson County Personnel Board" entered by this Court in Civil Action Nos. 75-P-0666S, 74-2-17-S and 74-2-12-S ("Board Decree").

FOURTH DEFENSE

The complaint is in flagrant violation of the obligation of the United States, imposed by the City Decree, to defend the lawfulness of all remedial actions and practices required or permitted by the City Decree.

FIFTH DEFENSE

The complaint is barred by the City Decree.

SIXTH DEFENSE

The complaint is barred by the Board Decree.

SEVENTH DEFENSE

The City's consideration of the race of competing candidates for promotions to fire lieutenant and fire captain positions with the Birmingham Fire and Rescue Service was a direct consequence of the City Decree and was authorized, required or permitted by the City Decree, to which the United States of America ("United States") is a party.

EIGHTH DEFENSE

The United States has waived its right to invoke the jurisdiction of this Court and to seek relief for the claims alleged in the complaint.

NINTH DEFENSE

In the City Decree, the United States represented that (1) it would defend the lawfulness of the "[r]emedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of" the City Decree and (2) compliance with the City Decree would "constitute compliance by the City with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Omnibus Crime Control and Safe Streets Acts [sic] of 1968, as amended, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1981 and § 1983, and the Fourteenth Amendment to the Constitution of the United States." In reliance on the representations of the United States and at the request of the United States the City and Defendant-Intervenors executed the City Decree. Also in reliance on those representations, the City, where appropriate, made numerous race and gender conscious personnel decisions pursuant to its terms, and Defendant-Intervenors compromised their discrimination claims against the City. The United States is estopped to invoke the jurisidiction of this Court and thus, may not litigate the matters addressed in the complaint, all of which involve remedial actions authorized, required or permitted by the terms of the City Decree.

TENTH DEFENSE

To the extent that the United States contends that the race-conscious promotion decisions of the City challenged in the complaint were not authorized, required or permitted by the City Decree, the United States has failed to satisfy the preconditions to litigation of such claims specified by ¶ 4 of the City Decree.

ELEVENTH DEFENSE

The complaint is an abuse of process which is intended to coerce the City to abandon or compromise its obligations to Defendant-Intervenors and others under the City Decree, which the City accepted at the request of the United States.

TWELFTH DEFENSE

The United States has failed to satisfy the preconditions to this suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. Specifically, the United [States] has failed to: (a) file charges of employment discrimination against the City, the Board or either of them, (b) conduct an investigation of the alleged unlawful employment practices of the City, the Board or either of them (c) enter findings that it has reasonable cause to believe that the City, the Board or either of them has engaged in a pattern and practice of unlawful employment discrimination, (d) provide notice to the City, the Board or either of them of such findings, and (e) engage in conciliation efforts with the City, the Board or either of them, all as required by 42 U.S.C. §§ 2000e-5 and 2000e-6 and Section 5 of Reorganization Plan No. 1 of 1978, [1978] *U.S. Code Cong. & Admin. News*, 9795, 9800.

THIRTEENTH DEFENSE

The United States lacks standing to prosecute the instant action pursuant to 42 U.S.C. §§ 1981 and 1983.

For further answer to the numbered paragraphs of the complaint, Defendant-Intervenors:

1. Deny the averments of paragraph 1.

2. Deny the averments of paragraph 2.

3. Admit the averments of paragraph 3 except state that (1) *Bennett* was filed on April 14, 1982, (2) the correct case number of *Wilks* is CV-83-P-2116-S, (3) by order dated April 14, 1984, a master case file for the consolidated cases was established under the caption "In re: Birmingham Reverse Discrimination Employment Litigation," CV-84-P-0903-S, and (4) since and before April 2, 1984, other individual members of the Birmingham Fire and Rescue Service have sought and have been granted leave to intervene in *Wilks*, but not in *Bennett*.

4. Admit the averments of paragraphs 4 and 5.

5. Admit that Richard Arrington, Jr., is the Mayor of the City of Birmingham but state that they lack knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 6.

6. State that they lack knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 7 thereof.

7. Admit the averments of the first sentence of paragraph 8 thereof, but deny the remaining averments of paragraph 8 thereof.

8. State that they lack knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 9 thereof.

9. Deny the averments of paragraph 10 thereof, except state upon information and belief that the City has considered the race and gender of competing promotional candidates in making promotions to Fire Lieutenant and Fire Captain positions to the extent authorized, required or permitted by the City Decree and as a direct consequence thereof.

8. Deny the averments of paragraphs 11 and 12 thereof.

9. Deny that the United States is entitled to any relief whatsoever.

10. Except as expressly admitted, Defendant-Intervenors deny the averments of the complaint.

WHEREFORE, these defendants demand a judgment in their favor and an award of costs and attorneys' fees incurred in the defense of the complaint.

COUNTERCLAIM OF DEFENDANT-INTERVENORS JOHN W. MARTIN, MAJOR FLORENCE, IDA McGRUDER, SAM COAR, EUGENE THOMAS AND CHARLES HOWARD TO THE COMPLAINT IN INTERVENTION OF THE UNITED STATES

I.

1. Pursuant to Rule 13 of the Federal Rules of Civil Procedure, Defendant-Intervenors set forth the following counterclaims:

II.
Jurisdiction

2. This Court has jurisdiction of this counterclaim pursuant to 28 U.S.C. §§ 1331, 1343, 2201 and 2202 and 5 U.S.C. §§ 702, 703, 705 and 706, separately and severally.

III.
PARTIES

3. John W. Martin, Major Florence, Ida McGruder, Sam Coar, Eugene Thomas and Charles Howard ("Defendant-Intervenors"), plaintiffs in Civil Action CV-75-P-0666-S are party signatories to the "Consent Decree with the City of Birmingham" and the "Consent Decree with the Jefferson County Personnel Board" entered in the Decree cases (hereinafter "City Decree" or "Board Decree" respectively).

4. The City of Birmingham ("City"), a defendant in Civil Action CV-75-P-06660-S [sic], is a party signatory to the City Decree entered in the Decree cases.

5. The Jefferson County Personnel Board ("Board"), a defendant in Civil Action CV-75-P-0666-S is a party signatory to the Board Decree entered in the Decree cases.

6. The United States of America ("United States"), a plaintiff in Civil Action CV-75-P-0666-S, is a party signatory to the City Decree and the Board Decree entered in the Decree cases.

IV.
Claim One

7. On September 7, 1983, plaintiffs, certain white male employees of the Birmingham Fire and Rescue Service, filed a complaint in CV-83-P-2116-S against defendants Richard Arrington, Jr., and the City of Birmingham collaterally attacking the legality of remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, the Consent Decrees entered by this court on August 21, 1981, in *U.S. v. Jefferson County*, No. CV-75-P-0666-S, *Martin v. City of Birmingham*, No. CV-74-Z-17-S and *Ensley Branch of the NAACP v. Seibels*, No. CV-74-Z-12-S (hereafter collectively the "Decree Cases"). On March 6, 1984, an order was entered allowing John W. Martin, *et al.*, to intervene as parties defendants in CV-83-P-2116-S.

8. The City Decree obligates all parties thereto to defend the lawfulness of the remedial measures contained in the Decree in the event of a collateral attack. Paragraph 3 of the City Decree provides:

> Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree shall not be deemed discriminatory within the meaning of paragraph 1 above or the provisions of 42 U.S.C. 2000e-2(h), (j), and *the parties hereto agree that they shall individually and jointly defend the lawfulness of such remedial measures in the event of challenge by any other party* to this litigation or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack.

(Emphasis added)

9. Paragraph 54 of the City Decree provides:

> 54. Compliance with the terms and conditions of this Consent Decree shall constitute compliance by the City with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1981 and § 1983, and the Fourteenth Amendment of the Constitution

of the United States as raised by the plaintiffs' complaints. Insofar as any of the provisions of this Consent Decree or any actions taken pursuant to such provisions may be inconsistent with any state or local civil service statute, law or regulation, the provisions of this Consent Decree shall prevail in accordance with the constitutional supremacy of federal substantive and remedial law.

10. The City has at all times performed its obligations under the terms of the City Decree and has made numerous race- and gender-conscious promotion and employment decisions pursuant to the terms of that Decree. Each of the City's race- and gender-conscious decisions challenged by the plaintiffs was authorized, required or permitted by the City Decree.

11. Pursuant to paragraphs 51 through 53 of the City Decree, the City has submitted various reports to the United States and the Defendant-Intervenors in the Decree Cases. Such reports contained comprehensive information, as designated by paragraphs 51-53 of the City Decree, concerning the race and gender of individuals hired by or promoted by the City.

12. The United States has not notified the Defendant-Intervenors that the City has improperly implemented the City Decree.

13. On February 28, 1984, the United States intervened as a party plaintiff in this action although it refused to file a complaint in intervention until January 14, 1985, the date specified by the Court as the time within which the United States must state its position.

14. On January 14, 1985, the United States filed a "Complaint In Intervention" in CV-83-P-2116-S alleging, in substance, that the remedial actions taken by the City as a direct consequence of the City Decree unlawfully discriminated against white males, and requested relief which is contrary to the requirements imposed on the City by the City Decree.

15. Since February 28, 1984, the United States has breached its obligations under the City Decree by: (i) providing economic and other support to the individual plaintiffs in CV-83-P-2116-S (hereafter "plaintiffs"), (ii) assisting counsel for plaintiffs in the prosecution of their claims against the City,

(iii) failing to support and cooperate with the City and the Defendant-Intervenors in their defense of the plaintiffs' claims, (iv) filing the "Complaint in Intervention" which supports the allegations of the plaintiffs, (v) invoking the jurisdiction of this Court to challenge the actions of the City which the United States represented in the City Decree it would consider to be in compliance with the statutory and constitutional provisions set forth in ¶ 54 of the City Decree, and (vi) requesting relief which, if granted, would be inconsistent with the City's obligations under the City Decree.

16. Defendant-Intervenors have been injured directly and substantially by the breach of the United States of its obligations under the City Decree.

Claim Two

17. Defendant-Intervenors adopt and reaver paragraphs 1-15 of the counterclaim and incorporate them as if set forth fully herein.

18. In the City Decree, the United States represented that (1) it would defend the lawfulness of the "[r]emedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of" the City Decree and (2) compliance with the City Decree would "constitute compliance by the City with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1981 and § 1983, and the Fourteenth Amendment to the Constitution of the United States."

19. In reliance on the representations of the United States, Defendant-Intervenors executed the City Decree. The City Decree is valid and lawful.

20. The United States, in violation of the City Decree, is (i) providing economic or other support to the plaintiffs, (ii) assisting counsel for plaintiffs in the prosecuting of their claims against the City, (iii) failing to support and cooperate with the City and Defendant-Intervenors in their defense of

plaintiffs' claims, (iv) prosecuting the claims raised in its "Complaint In Intervention," (v) invoking the jurisdiction of this Court to challenge actions taken by the City which are required, authorized or permitted under the City Decree, and (vi) requesting relief which, if granted, would preclude or hinder the City from complying with its obligations under the City Decree.

21. Such conduct by the United States constitutes unlawful and tortiuous [sic] interference with Defendant-Intervenors' contractual relations with the City of Birmingham and the United States under the City Decree.

22. By reason of such wrongful conduct and tortiuous [sic] interference with Defendant-Intervenors' contractual relations, Defendant-Intervenors have been injured directly and substantially by the conflicting positions adopted by the United States in these proceedings.

V.
Prayer for Relief

WHEREFORE, Defendant-Intervenors request this Court to:

(a) enter judgment dismissing the "Complaint In Intervention" and declaring that the United States has breached its obligations under the City Decree by: (i) arbitrarily and capriciously failing to abide by the terms of the City Decree; (ii) providing economic or other support to the plaintiffs, (iii) assisting counsel for plaintiffs in the prosecution of their claims against the City, (iv) failing to support and cooperate with the City and the Defendant-Intervenors in their defense of plaintiffs' claims (v) prosecuting the claims raised in its "Complaint In Intervention," (vi) invoking the jurisdiction of this Court to challenge actions taken by the City which are required, authorized or permitted under the City Decree, and (vii) requesting relief which, if granted, would preclude or hinder the City from complying with its obligations under the City Decree;

(b) enter an order directing the United States to comply with its obligations under the City Decree;

(c) enter an order prohibiting the United States from: (i) providing economic or other support to the plaintiffs, (ii) assisting counsel for plaintiffs in the prosecution of their claims against the City, (iii) failing to support and cooperate with the City in its defense of plaintiffs' claims, (iv) prosecuting the claims raised in its "Complaint In Intervention," (v) invoking the jurisdiction of this Court to challenge actions taken by the City which are required, authorized or permitted under the City Decree, and (vi) requesting relief which, if granted, would preclude or hinder the City from complying with its obligations under the City Decree; and

(d) enter an order awarding Defendant-Intervenors their costs incurred in connection with this counterclaim and retaining jurisdiction for further proceedings concerning attorneys' fees pursuant to Local Rule 11.

Defendant-Intervenors pray for such other additional relief as justice may require.

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[Certificate of Service, dated February 13, 1985, omitted]

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Nos. 87-1614, 87-1639, 87-1668

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

JOHN W. MARTIN, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX
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August 18, 1988

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PETITIONS FOR *CERTIORARI* FILED MARCH 30, MARCH 31 AND APRIL 1, 1988
CERTIORARI GRANTED JUNE 20, 1988

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

OPINION

The defendants in these "reverse discrimination" cases have moved for partial summary judgment, seeking to dismiss portions of the plaintiffs' claims predicated upon the plaintiffs' higher rankings and test scores on selection procedures of the Personnel Board. The court concludes that, although the motions in their present form should be denied, an order should be entered which will likely have the same practical effect on further proceedings.

I. Background.

The present litigation stems from three cases instituted in 1974 and 1975 against the Jefferson County Personnel Board and various governmental agencies served by the Board, including the City of Birmingham. Two of these earlier suits were brought as class actions, charging racial discrimination against blacks in hiring and promotions; the third was brought by the United States, charging a pattern and practice of discrimination against both blacks and women. Among other allegations, the plaintiffs contended that the registers used to determine persons eligible for hiring or promotion were the product of discriminatory tests administered by the Board to screen and rank applicants and that the employing agencies engaged in still further discrimination when selecting individuals from these already tainted lists.

The cases were consolidated for trial in 1976 on the initial issue of the validity of tests used to screen and rank police and firefighter applicants. The court found that the tests had a severe adverse impact on blacks and were not sufficiently job

related to be valid under 42 U.S.C. § 2000e-2(h). The Board was directed to include in its future certifications to the employers a sufficient number of black applicants to avoid any adverse impact caused by these tests. This decision was affirmed in all major aspects. *Ensley Branch of NAACP v. Seibels*, 616 F.2d 812 (5th Cir.), *cert. denied sub nom. Personnel Board v. United States*, 449 U.S. 1061 (1980).

A second consolidated trial was held in 1979 regarding many other examinations and screening devices of the Board that likewise appeared to have an adverse impact on blacks or women. Experts for both sides presented extensive evidence regarding the effect and validity of these tests and procedures. While awaiting the court's decision, the parties engaged in extensive settlement negotiations that ultimately culminated in proposed consent decrees to resolve the litigation.[1] The settlements with the Board and with the City of Birmingham included both provisions benefiting specific plaintiffs or class members—such as back pay and preferential hiring or promotion—and provisions benefiting the entire class—such as goals for certification and selection of minority candidates in future hiring and promotional decisions.

On August 18, 1981, after a fairness hearing to consider the objections of all interested parties, the court approved the consent decrees with the Personnel Board and the City of Birmingham. The following day, the Birmingham Firefighters Association #117 and two of its members moved to intervene, contending that the decrees would adversely affect their rights. The court denied their request as untimely. This ruling was later upheld by the Court of Appeals. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1984).

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1. The parties recognized that, regardless of the decision on the second trial, a protracted third trial would be needed regarding the particular practices of the various governmental employers. Although some evidence concerning these practices had already been obtained and indeed introduced in evidence, extensive additional discovery was likely. The settlement discussions were pursued with the objective of avoiding the time and expense of further discovery and trial and in recognition of the inherent risks of litigation regarding both the issues under submission and those remaining to be tried.

Several white male firefighters then filed an independent action against the Board and the City of Birmingham, attacking the consent decree as discriminatory. Although denying their application for a preliminary injunction against enforcement of the decrees[2], the court recognized that the consent decrees might not bar all claims of "reverse discrimination" since they had not been parties to the prior suits. Several other suits were subsequently filed as individual or class actions by white males, contending that promotions made by Birmingham purportedly to comply with the consent decree discriminated against them because of their race or sex. These cases have been consolidated for pretrial purposes under the master caption of the "Birmingham Reverse Discrimination Employment Litigation."

II. Scope Of Pending Motions.

The City and the intervening defendants[3] have moved for partial summary judgment as to those portions of the plaintiffs' claims that are premised on the plaintiffs' higher test scores or ranking on the Board's eligibility register. Many, although not all, of the facts that may have some bearing on this motion are not genuinely in dispute.

Paragraph 5 of the Consent Decree with Birmingham provides as follows:

> "In order to correct the effects of any underrepresentation of blacks and women in the City's workforce caused by any alleged prior discriminatory employment practices, the City agrees to adopt as a long term goal, subject to the availability of qualified applicants, the employment of

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2. This ruling was upheld by the Court of Appeals in *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1984) [sic].

3. The persons who represented the class of blacks in one of the earlier actions and were parties to the consent decrees were allowed, on timely motion, to intervene as additional defendants in these "reverse discrimination" cases. Similarly, the United States, as a party to the earlier consent decrees, was allowed to intervene; in January 1985 it requested permission to realign itself with the plaintiffs, with whose interests its own position regarding "reverse discimination" was more compatible.

> blacks and women in each job classification . . . in percentages which approximate their respective percentages[4] in the civilian labor force of Jefferson County . . . ."

In paragraphs 6-8 of the decree the City agreed that in order to achieve these long term employment goals it would attempt, "subject to the availability of qualified [minority] applicants," to fill a specified percentage of vacancies on an annual basis with such applicants, this percentage ranging from 15% to 50% depending on the particular job or department. In short, qualified minority applicants were to be given a preference for a portion of the subsequent job vacancies until the long range employment goals were reached or the decrees expired.[5]

The plaintiffs in these cases contend that they would have been selected for post-decree promotions but for their race or sex. They assert that Birmingham's obligations under the consent decree cannot be relied upon by it in defense and that, indeed, employment decisions made in order to comply with the requirements of paragraphs 5-8 would necessarily constitute impermissible discrimination. As has been discussed with counsel earlier in these proceedings, the court is persuaded that the defendants can, however, defend these reverse discrimination claims if they establish that the challenged promotions were made because of the requirements of the consent decree.[6] See

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4. For blacks the appropriate percentage is approximately 28%; for women, approximately 39%. The consent decree provides a mechanism for adjusting these goals with court approval for jobs requiring professional degrees, licenses, or certificates.

5. Under paragraph 55 of the city's decree, the court is authorized to dissolve the decree after six years from its entry—approximately 2-1/2 years from now. Any of the parties, including the United States (which now appears to oppose at least some aspects of the decree), may make such a motion, and the court is to consider whether the purposes of the decree "have substantially been achieved."

6. The Court of Appeals had pretermitted ruling on this issue in the intervention proceedings. See *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983): "The consent decree would only become an issue [in an independent action asserting specific violation of their rights] if the defendant attempted to justify its conduct by saying that it was mandated by the consent decree. If this were the defense, the trial judge would have to determine whether the defendant's action was mandated by the decree and,

Palmer v. District Board of Trustees, 748 F.2d 595 (11th Cir. 1984).[7]

As a secondary contention, the plaintiffs argue that the decree cannot be used to justify a race-conscious or gender-conscious promotion if that action is not required by the decree.[8] They then note the provisions of paragraph 2 of Birmingham's consent decree:

> "Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer or promote a less qualified person in preference to a person who is demonstrably better qualified based on the results of a job related selection procedure."

Plaintiffs contend that by virtue of this provision the decree does not require, and hence provides no protection against a claim of reverse discrimination based on, the selection of a less qualified black or woman. Plaintiffs propose to establish that they were demonstrably better qualified than the successful minority applicants and for this purpose will cite the higher

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if so, whether that fact alone would relieve the defendant of liability that would otherwise attach. This is, indeed, a difficult question. . . . We should not, however, preclude potentially wronged parties from raising such a question merely because it is perplexing. Since we assume that the forum hearing any future suit by the would-be intervenors alleging discrimination would consider their claims carefully, we hold that the district court was justified . . . in denying intervention."

7. The affirmative action aspects of the decrees regarding employment and promotion of blacks in the police and fire departments can be justified on the basis of the judicial findings—affirmed on appeal—that such persons had been unlawfully discriminated against in testing for entry level positions in those departments. The other affirmative action aspects of the decrees, although not based on judicial findings of discrimination, pass muster under the standards set in *Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981), cited with approval in the *Palmer* case, 748 F.2d at 600.

8. This position stems from language in *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983), in which the appellate court noted that an element in a defense based upon the consent decree would be

scores they received on the Board's promotional tests, which they assert are job related selection procedures.

The City and the intervening defendants assert that promotions of qualified minority candidates to meet the remedial goals established in the consent decree would not constitute unlawful discrimination, whether such promotions be mandated by the decree or merely permitted by it. They further contend that, even if their defense based on the decree is limited to employment decisions mandated by it, scores by applicants on the Board's tests—and in turn the position of such persons on the Board's eligibility register—would be immaterial in ascertaining whether the decree did or did not require particular promotions of minority applicants.

The pending summary judgment motions are focused on this latter contention; namely, that scores on the Board's promotional tests should not be considered in deciding whether particular applicants were demonstrably better or less qualified for purposes of paragraph 2. The ruling on these motions[9] has potentially great significance not only on the ultimate merits of the controversy, but also on the scope and length of further discovery and trial. Indeed, if test scores will be relevant in deciding the applicability of paragraph 2, one may expect a substantial controversy between the parties regarding the

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"whether the defendant's action was *mandated* by the decree." (Emphasis added.) The later decision of that court (by a panel with two of the judges who were on the *Jefferson County* case) in *Palmer, supra*, suggests a test more favorable to the defendants. In the present litigation the court has deferred its ruling as to the proper standard until the factual basis of the claims and defenses have been more fully developed.

9. Despite plaintiffs' arguments to the contrary, a motion under Fed. R. Civ. P. 56 is not an inappropriate vehicle for presenting this issue to the court. A defendant "against whom a claim . . . is asserted" may move under Rule 56(b) for summary judgment in its favor "as to . . . any part thereof;" and under Rule 56(d) the court may determine what "material" facts are controverted. Moreover, the motion may, to the extent appropriate, be treated as one for a protective order under Rule 26(c) against discovery that would be an "undue expense or burden" or as one under Fed. R. Evid. 104 for a pretrial motion on the admissibility of evidence.

validity of each test as a "job related selection procedure" for purposes of that paragraph.[10]

III. Discussion.

The basic facts regarding the procedures by which applicants are certified by the Board to the employing agencies have been stated in earlier decisions and need not be repeated in detail. In order to fulfill its responsibilities under state law, the Board develops and periodically administers tests to persons interested in civil service positions who satisfy any prerequisites for appointment established by the Board. For very practical reasons, these tests only purport to measure a sample of the knowledge, skills, and abilities that may be needed for successful performance of a particular job.[11]

An applicant's raw test score—which for some jobs is a composite of weighted scores on different segments of the examination—is converted by the Board into a single numerical score. Applicants scoring below the minimum established by the Board are eliminated from further consideration. To the converted test score of any "passing" applicant, the Board adds (as required by state law) one point for each year of the applicant's classified service, up to a maximum of 20 points. These individuals are placed on the Board's "Eligible Register" in the order of their combined total of test points and seniority points. The Board does not disclose this Register to the employing agencies or to the applicants. It does, however, provide to each applicant information about his or her own score and position number on the Register; to the extent they share this information, applicants are able to construct the equivalent of the Register.

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10. In such a controversy the position of two of the major parties might be the reverse of that in the earlier litigation. The United States, which previously had attacked the various tests as not sufficiently job related, may attempt to support their validity; on the other hand, the City may seek to challenge the validity of the tests.

11. For example, although the position of police sergeant may require both the ability to accurately shoot a firearm and knowledge of constitutional law, the Board does not attempt to measure applicants' abilities with firearms and attempts to measure their knowledge of constitutional law by asking some representative questions.

When advised that a governmental employer wishes to make a promotion, the Board submits to the employer a "Certification of Eligibles," which contains the top three names then remaining on the Register.[12] Under the consent decrees the Board may certify the names of additional qualified minority applicants from further down on the Register "whenever such action is necessary to provide the City with a certification list that contains sufficient numbers of blacks and females to meet the goals" of the decrees.

The certification sent by the Board does not reflect the test scores or Register ranking of the persons so certified. Birmingham acknowledges however that those making employment decisions "assume" that the order of names on the certification indicates their relative standing on the register—that is, that the second name on the certification is lower on the Register than the first name and higher on the Register than the third name.[13] Plaintiffs do not contend that the relative placement on the Register of the applicants establishes in and of itself that the higher ranked applicants are demonstrably better qualified for promotion.[14] Rather, they argue that the tests are job related selection procedures and accordingly that under paragraph 2 of its decree the city would not be required to promote applicants with lower test scores. They assert that city officials either know these scores or by inference from the certification can determine the relative scores of the various candidates. Alternatively they argue that, regardless of the knowledge the city

12. If multiple appointments to the same job are contemplated, the Board certifies an additional name from the top of the Register for each additional position.

13. The United States makes a curious attack upon the inclusion of such "assumptions" in the affidavits of the city's officials, asserting that such represents matters beyond their personal knowledge and hence impermissible under Fed. R. Civ. P. 56. These objections are without merit, for these "assumptions" are not being presented as evidence of what the Board actually does in making certifications, but only as evidence of the state of mind of the officials in using the certifications.

14. Although the validity of bona fide seniority systems is recognized under Title VII, it could hardly be contended that because of longer city service an individual would be demonstrably better qualified for promotion.

may have about test scores when deciding whom to promote, they—the plaintiffs—should be entitled in a subsequent claim of discrimination to demonstrate their superior qualifications by reference to the test scores and thereby show that the city could have promoted them without violating the consent decree. This latter contention should be addressed first because, if plaintiffs succeed on this point, there would be no need to determine what information city officials may have had about test scores when deciding on promotions.

Paragraph 2 provides in relevant part as follows: "Nothing herein shall be interpreted as requiring the City . . . to promote a person who is not qualified or . . . to promote a less qualified person in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure." The obvious purpose of the paragraph was to relieve the city from responsibility under the decree if, although otherwise mandated by the decree, it should reject a minority candidate because of the results of a job related selection procedure showing that person to be unqualified or demonstrably less qualified. In evaluating any failure by the city to meet its obligations under the decree, the court would focus its attention on the information the city had when it declined to appoint the minority candidates and not on subsequently obtained information that played no part in those appointments. Such a proceeding might well include further studies regarding the job-relatedness of the selection procedures upon which the city relied in making its employment decisions; however, there would be no need to determine whether promotional criteria not considered by the city might have been valid.

Although the context is different in this litigation involving claims of reverse discrimination, the answer is the same. In short, the effort by plaintiffs to show that promotions of minority candidates were not mandated by the decree because of paragraph 2 will depend upon their establishing, at a minimum, that when making those selections the city had information demonstrating that such candidates were less qualified. Consideration must therefore be given on these Rule 56 motions to the question of what information regarding test scores city officials may have had when deciding whom to promote from the Board's "Certification of Eligibles."

It cannot be genuinely disputed that the city officials have not been provided by the Board with test scores or ranking, seniority points, final scores or ranking, or position number on Register.[15] This is not to say, however, that city officials have absolutely no knowledge about such matters.

First, the appointing officials may be provided by or through the applicants themselves information about test scores or rankings. As earlier noted, applicants are provided information about their own scores and Register position and by sharing this information they can develop an approximation of the Register.[16] According to depositions and affidavits submitted by plaintiffs, these unofficial listings are sometimes posted at fire stations or other locations where they are viewed by supervisors who may be involved in deciding on appointments when vacancies occur. It is unclear whether these posted listings disclose merely the projected positions on the eligibility register or also the final grade based on test scores and seniority.

Second, the appointing officials can draw some inferences about test scores from the Certification of Eligibles provided by the Board. Since the officials "assume"—an assumption which, to the extent pertinent, appears consistent with the actual practice of the Board—that the eligibles are listed on the certificate in the same order in which they appear on the Eligibility Register, the total of the converted test score and seniority points of the individual who, for example, is second on the certificate may be assumed to be higher than those for individuals lower on the certificate but less than that for the individual highest on the certificate. Appointing officials may

15. No dispute arises from the fact that at an earlier stage in these proceedings a city official did have this information regarding a particular position (Fire Lieutenant Examination, January 26, 1982). The official has explained by affidavit when and how this information was obtained and for what purpose it was used. In short, these items were procured by the city from the Board through discovery requests after a claim of reverse discrimination was made and were used only in the course of that proceeding.

16. These informal compilations are not necessarily reliable. As indicated in these same depositions, information may not be obtained from all applicants and the information provided by the applicants is not always accurate.

already know or be able to determine from city records how many seniority points various individuals on the certificate would have been awarded. By considering these seniority points, an appointing official could infer that a person would have had a higher converted test score than those individuals lower on the certificate with the same or a greater number of seniority points, and a lower converted test score than those higher on the certificate with the same or a lesser number of seniority points.[17] No such inference, however, could be drawn when comparing an individual with those lower on the certificate having fewer seniority points or with those higher on the certificate having more seniority points.

Knowledge of relative test scores, whether inferred from the certificate of eligibles or learned from information supplied by applicants, would not however establish that a particular applicant would be "demonstrably better qualified" than another with a lower score. That a test may be valid for both screening and ranking purposes does not mean that as between two individuals the one with the higher score is better qualified than the one with the lower score. Rather, the validity of a test is assessed in the context of its ability to make job-related measurements that are reliable and valid for groups of individuals. Any attempt to assess the relative qualifications of two individuals on the basis of their test scores is a risky process, and at a minimum requires knowledge of the magnitude of the difference in their scores if not also the significance of that difference given the characteristics of the measuring device. The need for such information under paragraph 2 of the consent decree is highlighted by the language of that paragraph relieving the city from its minority employment goals only if such minority applicants are "*demonstrably*" less qualified.[18] (Emphasis added.)

The "Rule of Three"—under which employing agencies have been empowered by state law to select any of the three

17. A limited additional inference could be drawn in such circumstances as to the magnitude of the difference; namely, the difference in converted test scores would have been no less than the difference in seniority points.

18. Of the common meanings of the word "demonstrably," the ones most suitable in this context are "obviously" or "clearly."

names submitted by the Board—implicitly recognizes this fundamental concept that the Board's tests, even if sufficiently job related when considered for a group of applicants, are not necessarily a proper measurement of relative qualifications of particular individuals. Under this rule, the city has been free to select the person on the certification with the lowest test score, and this has been true even though that person's test score may have been significantly lower than those of others certified. Moreover, given the role of seniority points, the persons certified for consideration might have converted test scores as much as twenty points below those of persons not certified for consideration and those with the highest test scores may not receive consideration until after many persons with lower scores have been selected.[19]

What this means is that the certification would not have provided city officials with sufficient information to relieve it from its obligation to meet the employment goals established by the decree. In turn, the plaintiffs in this reverse discrimination case cannot prevail on a claim that minority appointments were not required under paragraph 2 by relying on the limited knowledge about test results that could be derived from the Board's certifications.

The materials submitted by plaintiffs in opposition to the Rule 56 motion do, however, create a genuine issue as to the extent of knowledge that city officials may have had about actual test scores as a result of information provided by the employees themselves. It may be—although this appears very doubtful—that the city officials making (or recommending) promotions did on some occasions have sufficient reliable information about these test scores and about the significance of the differences in these scores to have been justified in not promoting a minority applicant. In such a circumstance, the unsuccessful white male may be able to establish, subject to

19. As an example, the person who received the highest test score on the January 1982 fire lieutenant exam had only 4 seniority points and was ranked 19th on the eligibility register.

providing additional proof regarding the validity of the test,[20] that the promotion of the minority applicant was not required by the decree and was in turn discriminatory. The court therefore cannot say at this time that the defendants are entitled to summary judgment against all efforts of plaintiffs to show information regarding test scores or that information regarding validity of these tests will necessarily be irrelevant.[21]

Although the pending motion for summary judgment is therefore due to be denied, the fact remains that the plaintiffs are not likely to prevail on this part of their reverse discrimination claims, in which event the validity of the Board's tests will not be relevant. Considering the substantial time and expense of discovery and trial that might be wasted on exploration of the validity of these tests, the court concludes (1) that under Fed. R. Civ. P. 42(b) issues regarding the validity of such tests should be severed for subsequent trial, as necessary, after resolution of the other issues in this litigation and (2) that under Fed. R. Civ. P. 26 further discovery into such issues should be deferred until after this initial trial.

As earlier noted, the United States has asked for permission to realign itself with the plaintiffs. The defendants oppose this request, noting that the decree (to which the United States was a party) provides as follows:

> "3. Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree shall not be deemed discriminatory . . . and the parties hereto agree that they shall individually and jointly the [sic] defend the lawfulness of such remedial measures in the event of challenge

20. The court disagrees with the defendant's contention that paragraph 2 could apply only if the city officials at the time of making their selections also had detailed information supporting the validity of the tests.

21. Plaintiffs contend that, irrespective of its relevance on the city's defense premised on the consent decree, the validity of the tests may also be material in the plaintiffs' establishment of a prima facie case of discrimination (that test scores, if the tests were valid, would help prove they were qualified for the position filled by a minority applicant) or to show that any defense based on selection of the better qualified candidate would have been pretextual. While this may be true, it does not appear that the defendants in this litigation will be challenging the plaintiffs' qualifications or claiming that they selected the better qualified candidate.

by any other party to this litigation or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack.

. . . .

"54. Compliance with the terms and conditions of this Consent Decree shall constitute compliance by the City with all obligations arising under Title VII . . . as raised by the plaintiffs' complaints. Insofar as any of the provisions of this Consent Decree or any actions taken pursuant to such provisions may be inconsistent with any state or local civil service statute, law or regulation, the provisions of this Consent Decree shall prevail in accordance with the constitutional supremacy of federal substantive and remedial law."

To the extent the United States in good faith believes that actions of the city are discriminatory against the plaintiffs and are neither required nor permitted by the Consent Decree, it may support the plaintiffs' position in this litigation without violating the terms of the consent decree and accordingly may be allowed to align itself as a party plaintiff.

In its brief supporting the plaintiffs on these pending summary judgment motions, the United States has advanced arguments that appear to be contrary to its obligations under the Decree and inconsistent with positions it pressed so vigorously in the earlier litigation. It seems to be contending that promotion of a minority candidate with lower test scores would never be required by the Decree and would constitute a prima facie case of impermissible reverse discrimination and, indeed, that the city would have a duty to seek such information before considering appointment of a minority candidate. Such a position could hardly be consonant with its obligations to uphold the decree, which clearly contemplated that a portion of new appointments would go to minority candidates lower on the eligibility registers. Its apparent change in position is particularly questionable in view of the fact that it has contended—and documented with extensive evidence in the earlier litigation—that the tests have discriminatory impact against minority candidates and are not sufficiently job related to be

valid ranking devices under 42 U.S.C. § 2000e-2(h).[22] Although permitting the United States to align itself with the plaintiffs, the court will insist that the United States act in accord with its obligations under the Decrees.

This the18th day of February, 1985.

/s/ Sam C. Pointer, Jr.
United States District Judge

22. The United States might, of course, be justified in changing its position regarding the impact and validity of these tests if it had obtained new evidence demonstrating its earlier views were incorrect. There is no indication that any such new evidence has surfaced.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	CIVIL ACTION NO.
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CV 84-P-0903-S

ORDER

In accordance with the accompanying Opinion, it is hereby ORDERED as follows:

1. The Motions for Partial Summary Judgment filed by the defendants are DENIED.

2. Pursuant to Fed. R. Civ. P. 42(b), issues regarding the effect and validity of Personnel Board tests are severed for subsequent trial after resolution of the other issues in this case.

3. All discovery pertaining to the effect and validity of such tests is deferred until completion of the initial trial.

4. The United States' Motion to Strike Affidavits or Portions Thereof is DENIED.

5. The United States' Motion to Realign as a Party-Plaintiff in *Bennett v. Arrington*, CV 82-P-0850-S is GRANTED, subject however, to the limitations discussed in the accompanying Opinion.

This the 18th day of February, 1985.

/s/ Sam C. Pointer, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	CIVIL ACTION NO.
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CV 84-P-0903-S

MOTION TO INTERVENE AS PARTIES PLAINTIFF

Comes now David L. Hamilton, Randy E. Woods, Stanley D. Rogers, James R. Pharris, William V. Sulser, Jr., Ronald Vaughn, Rex Earl Keeling, Mike C. Thomas, Kenneth W. Smith, John E. Courington, and Barry Dale Bartlett and respectfully move this court of leave to intervene as parties plaintiff in this cause, pursuant to Rules 24a and 24b, Federal Rules of Civil Procedure. In support thereof, Movants state:

(1) Movants are all white male employees of the defendant, City of Birmingham. Movants present claims substantiallay [sic] identical to the claims of the original plaintiffs in this action in that Movants were denied promotions on the basis of their race, and Movants have been similarly damaged by the Personnel Board Defendant's practices of certification on the basis of race.

(2) The Movants claim an interest in the transactions which are the subject of this action in that Movants seek to challenge as illegal and unconstitutional the actions of the defendants in the same manner as the original Plaintiffs, the Movants present the same arguments as the original Plaintiffs, the Movants have been victims of the same practices as the original Plaintiffs, and the Movants seek relief similar to that of the original Plaintiffs.

(3) Disposition of this action without Movant's participation may, as a practical matter, impair or impede the ability of Movants to protect their interests.

(4) The interests of Movants are not adequately represented by the original Plaintiffs in that said parties may not adequately seek all relief available to the Movants upon a finding of liability.

(5) The Movants [sic] claims represent common questions of law and fact with the claims of the original Plaintiffs.

(6) Filed herewith is a proposed complaint in intervention.

/s/ Ralph E. Coleman
Ralph E. Coleman
2175 - 11 Court South
Birmingham, Alabama 35205

[Certificate of Service, dated February 19, 1985, and exhibits omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

ANSWER OF THE DEFENDANT, PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, TO THE AMENDED COMPLAINT IN INTERVENTION OF HOWARD E. POPE

Come now the defendants, Hiram Y. McKinney, James B. Johnson, and Roderick Beddow, Jr., and the Personnel Board of Jefferson County (hereinafter collectively the "Board"), and answer the identically numbered paragraphs in plaintiff Pope's amended complaint as follows:

1. The Board admits that this court has jurisdiction over the case under the stated statutory sections, but denies that it has taken any action that violates any of plaintiff's rights.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. The Board admits that Hiram Y. McKinney, James B. Johnson, and Roderick Beddow, Jr., are members of the Personnel Board, and, as such, they are responsible generally for its administration and operation, including the procurring and reviewing of applications and certification of eligibles for appointment with defendants named in paragraphs (3) and (4).

7. The Board relies upon the answer of the defendant, City of Birmingham, in regard to this averment.

8. Admitted.

9. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

10. Denied.

11. There is no paragraph 11.

12. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

13. The Board entered into a Consent Decree which was approved by the United States District Court for the Northern District of Alabama, Southern Division, in Case No. CV-75-P-0666-S, and has made race conscious certifications pursuant to this Consent Decree, as is required by the Consent Decree. As such, qualifications are now no longer made "solely on the basis of merit, competition, and superior qualifications." If these actions by the Board are deemed to be favoring blacks to the detriment of whites, then the Board admits the averments of paragraph 13 of the complaint. Otherwise, the Board denies the averments of paragraph 13.

14. The Board admits that it will continue to pursue its policies and practices in accordance with the Board's Enabling Act and Consent Decree. The Board denies the remaining averments of the paragraph.

DEFENSES

15. All of the actions taken by the Board concerning the above-referenced averments were taken pursuant to and in accordance with the Consent Decree entered by the United States District Court for the Northern District of Alabama, Case No. CV 75-P-0666-S, and related cases, and therefore the Board is not liable for any acts complained of in the complaint.

16. The complaint is barred by the doctrine of collateral estoppel.

17. The complaint is barred by the doctrine of res judicata.

18. All of the actions referred to above were taken by the Board in full conformity with all applicable constitutional provisions, statutes, laws, regulations, and court orders and decrees.

19. All of the Board's actions were made in accordance with the validly approved Consent Decree. Since all of the Board's actions were taken in accordance with the validly approved Consent Decree, the Board is immune from liability for its actions made pursuant thereto. As the Consent Decree permits and requires race conscious selection procedures and practices, the Board is immune from liability even though it uses race conscious selection procedures and practices.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

Attorneys for the Personnel Board
of Jefferson County, Alabama

OF COUNSEL:

JOHNSTON, BARTON, PROCTOR,
SWEDLAW & NAFF
1100 Park Place Tower
Birmingham, Alabama 35203
205/322-0616

[Certificate of Service, dated February 26, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

PERSONNEL BOARD'S ANSWER
TO THE COMPLAINT OF
JAMES A. BENNETT

Come now the defendants, the Personnel Board of Jefferson County, James W. Fields, as Director of Personnel of the Personnel Board of Jefferson County (and successor in office to Joseph W. Curtin), Hiram Y. McKinney, James B. Johnson, and Roderick Beddow, Jr., in their official capacities as members of the Personnel Board of Jefferson County (Mr. Beddow is substituted for the late Henry P. Johnston), and answer the complaint of James A. Bennett and others filed in this cause on April 14, 1982, by answering the identically numbered paragraphs of plaintiffs' complaint as follows:

1. The Board admits that this Court has jurisdiction over this case under the stated statutory sections, but denies that it has taken any action that violates any of plaintiffs' rights.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. The Board admits that Hiram Y. McKinney, James B. Johnson, and Roderick Beddow, Jr. are the members of the Personnel Board and that James W. Fields is Director of Personnel of the Personnel Board and, as such, they are responsible generally for the administration and operation.

7. The Board relies upon the answer of the defendant City of Birmingham in regard to this averment.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

13. The Board entered into a Consent Decree which was approved by the United States District Court for the Northern District of Alabama, Southern Division, in Case No. CV 75-P-0666-S, and has made race conscious certifications pursuant to this Consent Decree, as is required by the Consent Decree. As such, certifications made by the Board are no longer made "solely on the basis of merit, competition and superior qualifications." If these actions by the Board are deemed to be favoring blacks to the detriment of whites, then the Board admits the averments of paragraph 13 of the complaint. Otherwise the Board denies the averments of paragraph 13.

14. The Board admits that it is certifying candidates on the basis of race under the protection of the Consent Decrees entered into and approved by this Court in Case Nos. 75-P-0666-S, 74-Z-17-S, and 74-Z-12-S. The Board denies the remaining averments of paragraph 14 of the complaint.

15. Denied.

16. Denied.

17. Denied.

18. The averments of paragraph 18 of the complaint are no longer relevant.

19. Admitted.

20. The averments of paragraph 20 of the complaint are no longer relevant.

21. Denied.

22. The Board denies that plaintiffs are entitled to any relief against the Board.

DEFENSES

23. All of the actions taken by the Board concerning the above-referenced averments were made pursuant to and in accordance with a Consent Decree that was entered by the United States District Court for the Northern District of Alabama, Southern Division, Case No. CV 75-P-0666-S, and related cases, and therefore the Board is not liable for any of the acts complained of in the complaint.

24. The complaint is barred by the doctrine of collateral estoppel.

25. The complaint is barred by the doctrine of res judicata.

26. All of the actions referred to above were taken by the Board in full conformity with all applicable constitutional provisions, statutes, laws, regulations, court orders, and decrees.

27. All of the Board's actions were made in accordance with the validly approved Consent Decree. Since all of the Board's actions were taken in accordance with the validly approved Consent Decree, the Board is immune from liability for its actions made pursuant thereto. As the Consent Decree permits and requires race conscious selection procedures and practices, the Board is immune from liability even though it uses race conscious selection procedures and practices.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

Attorneys for the Personnel Board
of Jefferson County, Alabama

OF COUNSEL:

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SWEDLAW & NAFF
1100 Park Place Tower
Birmingham, Alabama 35203
205/322-0616

[Certificate of Service, dated February 26, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

PERSONNEL BOARD'S ANSWER TO THE COMPLAINT IN INTERVENTION OF JOHN E. GARVICH, JR.

Come now the Personnel Board of Jefferson County, Alabama, its members and director, and answer the complaint in intervention of John E. Garvich, Jr., James W. Hinson, and Robert Bruce Millsap by answering the identically numbered paragraphs in plaintiffs' complaint in intervention as follows:

1. The Board adopts by reference its answers to paragraphs 1 through 15 of the complaint, as amended, of Robert K. Wilks, et al., which answer was filed on October 18, 1983.

2. The Board relies upon the answer of defendant, City of Birmingham, in regard to the averments of paragraph 2. The Board denies that plaintiffs are entitled to any relief against the Board.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

Attorneys for the Personnel Board
of Jefferson County, Alabama

OF COUNSEL:

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SWEDLAW & NAFF
1100 Park Place Tower
Birmingham, Alabama 35203
205/322-0616

[Certificate of Service, dated February 26, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

PERSONNEL BOARD'S ANSWER TO THE COMPLAINT IN INTERVENTION OF THE UNITED STATES OF AMERICA

Come now the Personnel Board of Jefferson County, Alabama, its members and director, and answer the complaint in intervention of the United States of America as follows:

1. The Board admits that this Court has jurisdiction over the case under the stated statutory sections, but denies that it has taken any actions that violate any of those statutes.

2. The Board admits that this Court has jurisdiction over the case under the stated statutory sections, but denies that it has taken any action that violates any of plaintiffs' rights.

3. The Board admits the averments of paragraph 3 except that it states that (1) *Bennett* was filed on April 14, 1982, (2) by order dated April 14, 1984, all of these cases were consolidated in a case titled "In Re: Birmingham Reverse Discrimination Employment Litigation," CV 84-P-0903-S, and (3) since and before April 2, 1984, other individual members of the Birmingham Fire and Rescue Service have sought and have been granted leave to intervene in *Wilks*, but not in *Bennett*.

4. Admitted.

5. Admitted.

6. The Board relies upon the answer of the defendant, City of Birmingham, in regard to this averment.

7. Admitted.

8. Admitted.

9. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

10. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

11. The Board admits that the United States, through the Department of Justice, has investigated the employment practices of the defendant but is without knowledge to admit or deny the rest of the averments.

12. The Board is without sufficient knowledge to admit or deny the averments of this paragraph. The Board denies that the plaintiffs or the plaintiff in intervention, the United States, is entitled to any relief against the Board.

DEFENSES

13. All of the actions taken by the Board concerning the above-referenced averments were taken pursuant to and in accordance with the Consent Decree entered by the United States District Court for the Northern District of Alabama, Case No. CV 75-P-0666-S, and related cases, and therefore the Board is not liable for any acts complained of in the complaint.

14. The complaint is barred by the doctrine of collateral estoppel.

15. The complaint is barred by the doctrine of res judicata.

16. All of the actions referred to above were taken by the Board in full conformity with all applicable constitutional provisions, statutes, laws, regulations, court order, and decrees. The complaint in intervention fails to state a claim against these defendants.

17. All of the Board's actions were made in accordance with the validly approved Consent Decree. Since all of the

Board's actions were taken in accordance with the validly approved Consent Decree, the Board is immune from liability for its actions made pursuant thereto. As the Consent Decree permits and requires race conscious selection procedures and practices, the Board is immune from liability even though it uses race conscious selection procedures and practices.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall
Attorneys for the Personnel Board
of Jefferson County, Alabama

OF COUNSEL:

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[Certificate of Service, dated February 26, 1985, omitted]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

PERSONNEL BOARD'S ANSWER TO AMENDMENT OF COMPLAINT OF VICTOR ZANNIS

Come now Hiram Y. McKinney, James B. Johnson, and Roderick Beddow, Jr., in their official capacities as members of the Personnel Board of Jefferson County, and James W. Fields, in his official capacity as Director of the Personnel Board of Jefferson County, and the Personnel Board of Jefferson County (hereinafter collectively referred to as the "Board"), and answer the identically numbered paragraphs in plaintiff Victor Zannis's amendment to complaint as follows:

15. The Board hereby adopts by reference its answers to paragraphs 1 through 14 of plaintiff's complaint as are fully set forth herein.

16-18. The Board admits that plaintiff Zannis was disciplined by the defendant City of Birmingham, but avers that plaintiff Zannis appealed the imposition of the discipline to the defendant Board. Pursuant to Section 22 of the Enabling Act, as most recently amended by Acts No. 679 and 684, *1977 Ala. Acts*, the Board heard his appeal. After hearing all of the evidence at a hearing held on July 8, 1983, the Board ruled:

> [I]t is the opinion and decision of the Board that the action of Chief Arthur V. Deutcsh, Birmingham Police Department, suspending said Peter J.V. Zannis for six (6) days, effective June 1, 1983, is hereby rescinded, and he shall receive full back pay for this period.

This decision by the Board was issued on July 15, 1983. The Board is without knowledge to admit or deny the remaining averments of these paragraphs.

19. The Board is without knowledge to admit or deny the averments of this paragraph.

20. The Board relies upon the answer of the defendant City of Birmingham in regard to the averments of this paragraph.

21. The Board is without knowledge to admit or deny the averments of this paragraph.

22. The Board admits that plaintiff Zannis is in receipt of a Right-to-Sue letter from the EEOC. The Board denies the remaining averments of this paragraph.

DEFENSES

23. The Board reavers and reincorporates its defenses I-VII which appear in its answer to the complaint.

24. Count Two fails to state a claim against the Board on which relief can be granted.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

Attorneys for the Personnel Board
of Jefferson County, Alabama

OF COUNSEL:

JOHNSTON, BARTON, PROCTOR,
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Birmingham, Alabama 35203
205/322-0616

[Certificate of Service, dated February 26, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

[In re: Zannis, *et al.* v. Arrington, *et al.*]

MOTION TO INTERVENE AND COMPLAINT IN INTERVENTION OF RAYMOND V. MARTIN

1. Raymond V. Martin moves the Court for leave to intervene as an additional party plaintiff.

2. Martin is a white male Birmingham Police Officer who has been denied promotion in a manner similar to the original plaintiffs in that he was denied promotion to the classification of Police Sergeant due to his race and sex.

3. Upon the granting of this motion, Martin adopts by reference all of the allegations of the original Complaint in *Zannis v. Arrington* by reference and prays for the same relief as requested therein for himself.

WHEREFORE, Martin respectfully moves for leave to intervene as an additional party plaintiff and further requests that he be permitted to adopt the original Complaint as his Complaint in Intervention.

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.
Attorney for Proposed
Intervening Plaintiff
Raymond V. Martin

OF COUNSEL:

FITZPATRICK & JORDAN
1009 Park Place Tower
Birmingham, Alabama 35203
Telephone 205/252-4660

[Certificate of Service, dated March 4, 1985, omitted]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

ORDER

Upon consideration of the pending motions in this case, it is hereby ORDERED as follows:

(1) The motion of the United States to strike portions of the supplemental affidavit of W. Gordon Graham is DENIED.

(2) The motion to intervene as parties-plaintiff on behalf on [sic] David L. Hamilton, Randy E. Woods, Stanley D. Rogers, James R. Pharris, William V. Sulser, Jr., Ronald Vaughn, Rex Earl Keeling, Mike C. Thomas, Kenneth W. Smith, John E. Courington, and Barry Dale Bartlett is GRANTED, and these parties are given leave to intervene in *Garner v. City of Birmingham*, CV 82-P-1461-S.

(3) The time within which the defendants must respond to the claims of these intervening plaintiffs is SUSPENDED until twenty (20) days after completion of the first trial in this case, or until otherwise ordered by the court.

This the 7th day of March, 1985.

/s/ Sam C. Pointer, Jr.
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2116-S

AMENDED ANSWER AND COUNTERCLAIMS OF DEFENDANTS RICHARD ARRINGTON, JR. AND THE CITY OF BIRMINGHAM TO THE COMPLAINT IN INTERVENTION OF THE UNITED STATES

Defendants Richard Arrington, Jr., and the City of Birmingham (collectively "the City") respond to the complaint in intervention filed by the United States of America in CV-83-P-2116-S (hereafter "complaint") as follows:

FIRST DEFENSE

The complaint fails to state a claim against these defendants upon which relief may be granted.

SECOND DEFENSE

The complaint constitutes an impermissible collateral attack upon: (1) the "Consent Decree With The City Of Birmingham" entered by this Court in Civil Action Nos. 75-P-0666-S, 74-Z-17-S and 74-Z-12-S ("City Decree") and (2) the "Consent Decree With the Jefferson County Personnel Board" entered by this Court in Civil Action Nos. 75-P-0666-S, 74-Z-17-S and 74-Z-12-S ("Board Decree").

THIRD DEFENSE

The complaint is in flagrant violation of the obligation of the United States, imposed by the City Decree, to defend the lawfulness of all remedial actions and practices required or permitted by the City Decree.

FOURTH DEFENSE

The complaint is barred by the City Decree and by the Board Decree.

FIFTH DEFENSE

The City's consideration of the race of competing candidates for promotions to fire lieutenant and fire captain positions within the Birmingham Fire and Rescue Service was a direct consequence of the City Decree and was authorized, required or permitted by the City Decree to which the United States is a party.

SIXTH DEFENSE

The United States has waived its right to invoke the jurisdiction of this Court and to seek relief for the claims alleged in the complaint.

SEVENTH DEFENSE

In the City Decree, the United States represented that (1) it would defend the lawfulness of the "[r]emedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of" the City Decree and (2) compliance with the City Decree would "constitute compliance by the City with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1981 and § 1983, and the Fourteenth Amendment to the Constitution of the United States." In reliance on the representations of the United States, and at the request of the United States, the City executed the City Decree and, where appropriate, made numerous race and gender conscious personnel decisions pursuant to its terms. The United States is estopped from invoking the jurisdiction of this Court and from litigating the matters addressed in the complaint all of which involve remedial actions authorized, required or permitted by the terms of the City Decree.

EIGHTH DEFENSE

To the extent that the United States contends that the race-conscious promotion decisions of the City challenged in the complaint were not authorized, required or permitted by the City Decree, the United States has failed to satisfy the preconditions to litigation of such claims specified by ¶ 4 of the City Decree.

NINTH DEFENSE

The complaint is an abuse of process which is intended to coerce the City to abandon or compromise its obligations under the City Decree which the City accepted at the request of the United States.

TENTH DEFENSE

The United States has failed to satisfy the preconditions to suit against the City under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. Specifically, the United States has failed to: (a) file charges of employment discrimination against the City, (b) conduct an investigation of the alleged unlawful employment practices of the City, (c) enter findings that it has reasonable cause to believe that the City has engaged in a pattern and practice of unlawful employment discrimination, (d) provide notice to the City of such findings, and (e) engage in conciliation efforts with the City, all as required by 42 U.S.C. §§ 2000e-5 and 2000e-6 and Section 5 of Reorganization Plan No. 1 of 1978, [1978] *U.S. Code Cong. & Admin. News*, 9795, 9800.

ELEVENTH DEFENSE

The City is immune from liability in this action pursuant to Section 713(b)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12(b)(1), and the Affirmative Action Guidelines issued by the Equal Employment Opportunity Commission ("EEOC") on January 19, 1979, 29 C.F.R. §§ 1608.2 and 1608.8.

TWELFTH DEFENSE

The conduct of the City challenged by the United States is permitted by the Affirmative Action Guidelines issued by the EEOC on January 19, 1979, 29 C.F.R. § 1608, *et seq*. The United States is barred from asserting a construction of Title VII of the Civil Rights Act of 1964, as amended,

42 U.S.C. § 2000e, *et seq.*, which fails to conform with said Guidelines.

THIRTEENTH DEFENSE

The United States lacks standing to sue these defendants pursuant to 42 U.S.C. §§ 1981 and 1983.

FOURTEENTH DEFENSE

For further answer to the numbered paragraphs of the complaint, the City:

1. Denies the allegations of paragraphs 1, 2, 11 and 12.

2. Admits the allegations of paragraphs 4, 5, 6 and 7.

3. Admits the allegations of paragraph 3 except that: (1) *Bennett* was filed on April 14, 1982, (2) the correct case number for *Wilks* is CV-83-P-2116-S, (3) by order dated April 14, 1984, a master case file for the consolidated cases was established under the caption "In re: Birmingham Reverse Discrimination Employment Litigation," CV-84-P-0903-S, and (4) since and before April 2, 1984, other individual members of the Birmingham Fire and Rescue Service have sought and have been granted leave to intervene in *Wilks*, but not in *Bennett*.

4. Admits the allegations of the first sentence of paragraph 8, but denies the remaining allegations contained therein.

5. Admits that it has received revenue sharing allocations from the United States Treasury pursuant to the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 6717, *et seq.*, but denies the remaining allegations of paragraph 9.

6. Denies the allegations of paragraph 10, but admits that it has considered the race and gender of competing promotional candidates in making promotions to Fire Lieutenant and Fire Captain positions to the extent authorized, required or permitted by the City Decree. The City avers that all of its race conscious promotion decisions were made as a direct consequence of the City Decree and pursuant to its terms.

7. Denies that the United States is entitled to any relief whatsoever.

8. Except as expressly admitted, the City denies the allegations of the complaint.

WHEREFORE, these defendants demand a judgment in their favor and an award of costs and attorneys' fees incurred in the defense of the complaint.

* * *

/s/ James K. Baker
James K. Baker

City Attorney
City of Birmingham
600 City Hall
Birmingham, Alabama 35202
(205) 254-2369

/s/ Robert K. Spotswood
James P. Alexander
Robert K. Spotswood
Gregory H. Hawley

Attorneys for Defendants
Richard Arrington, Jr., and
the City of Birmingham

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
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(205) 252-4500

[Certificate of Service, dated March 11, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

[In re: William L. Garner, *et al.* v. City of Birmingham, Birmingham Street and Sanitation Department]

MOTION TO INTERVENE AND COMPLAINT IN INTERVENTION OF DONALD VAUGHN

1. Donald Vaughn moves the Court for leave to intervene as an additional party plaintiff.

2. Vaughn is a white male employee of the City of Birmingham Street and Sanitation Department who has been denied promotion in a manner similar to the original plaintiffs in that he was denied promotion to the position of construction equipment operator due to his race and sex.

3. Upon the granting of this motion, Vaughn adopts by reference all of the allegations of the original Complaint in William L. Garner, et al v. City of Birmingham, Birmingham Street and Sanitation Department by reference and prays for the same relief as requested therein for himself.

WHEREFORE, Vaughn respectfully moves for leave to intervene as an additional party plaintiff and further requests that he be permitted to adopt the original Complaint as his Complaint in Intervention.

/s/ Ralph E. Coleman
Ralph E. Coleman
Attorney for Proposed
Intervening Plaintiff
Donald Vaughn

OF COUNSEL:

Ralph E. Coleman
2175 11th Ct. S.
Birmingham, AL 35205
Telephone: (205) 939-0444

[Certificate of Service, dated April 10, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

ORDER

Upon consideration at the court's motion docket of the pending motions in this case, it is hereby ORDERED as follows:

(1) The motion to admit Frederick Linton Medlin pro hac vice is GRANTED.

(2) The motion to intervene on behalf of Raymond V. Martin in *Zannis v. Arrington*, CV 83-P-2680-S, is GRANTED, but the time within which the defendants must file an answer or responsive pleading is suspended until twenty days following completion of the first trial in this case.

(3) The motion to intervene on behalf of Donald Vaughn in *Garner v. City of Birmingham*, 82-P-1461-S, is GRANTED, but the time within which the defendants must file an answer or responsive pleading is suspended until twenty days following completion of the first trial in this case.

(4) The motion to amend filed on behalf of the defendants Richard Arrington, Jr. and the City of Birmingham in *Wilks v. Arrington*, CV 83-P-2116-S, is GRANTED.

This the 17th day of April, 1985.

/s/ Sam C. Pointer, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In Re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2116-S
PETER JAMES VICTOR ZANNIS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2680-S
JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S
BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

AMENDMENT TO ANSWERS

Comes now one of the defendants, the Personnel Board of Jefferson County, Alabama (the "Board"), and hereby files this Amendment to Answers of the following complaints:

1. Robert K. Wilks, CV 83-P-2116-S.
2. Howard E. Pope in intervention, CV 83-P-2116-S.
3. John E. Garvich in intervention, CV 83-P-2116-S.
4. United States of America in intervention, CV 83-P-2116-S and CV 82-850-S.
5. James A. Bennett, CV 82-P-850-S.
6. BACE, CV 82-P-1852-S.
7. Peter James Victor Zannis, CV 83-P-2680-S.

FIRST ADDITIONAL DEFENSE

21. The Board adopts and realleges all the averments of its previous Answer and any previous amendments thereto as if they were set forth herein in their entirety.

22. Section 713(b) of Title VII of The Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-12(b), provides:

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission. . .

23. The Section 1608.2 of the Affirmative Action Guidelines issued by the Equal Employment Opportunity Commission, 29 C.F.R. § 1608 *et seq*., provides in pertinent part:

> These Guidelines constitute "a written interpretation and opinion" of the Equal Employment Opportunity Commission as that term is used in Section 713(b)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12(b)(1). . . .

24. Section 1608.8 of the Affirmative Action Guidelines, 29 C.F.R. § 1608.8, provides:

> Parties are entitled to rely on orders of courts of competent jurisdiction. If adherence to an Order of a United States District Court or other court of competent jurisdiction, whether entered by consent or after contested litigation, in a case brought to enforce a Federal, state or local equal employment opportunity law or regulation, is the basis of a complaint filed under Title VII or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine: (a) Whether such an Order exists and (b) whether adherence to the Affirmative Action Plan which is part of the Order was the basis of the complaint or justification. If the Commission so finds it will issue a determination of no reasonable cause. The Commission interprets Title VII to mean that actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII.

25. The conduct of the Board challenged by the plaintiffs, the plaintiffs in intervention, and the United States in intervention is lawful and protected by 42 U.S.C. § 2000e-12(b) and the Affirmative Action Guidelines.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

Attorneys for the Personnel Board
of Jefferson County, Alabama

OF COUNSEL:

JOHNSTON, BARTON, PROCTOR,
SWEDLAW & NAFF
1100 Park Place Tower
Birmingham, Alabama 35203
205/322-0616

[Certificate of Service, dated May 3, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
PETER J. ZANNIS, *et al.*, *Plaintiffs*, UNITED STATES OF AMERICA, *Plaintiff-Intervenor*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2680-S

COMPLAINT IN INTERVENTION

The United States of America, plaintiff-intervenor, by Edwin Meese III, Attorney General, alleges:

1. This complaint is filed by the Attorney General on behalf of the United States to enforce the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972); to enforce the nondiscrimination provisions of the State and Local Fiscal Assistance Act of 1972, as amended (31 U.S.C. § 6716); and for the purpose of protecting and enforcing rights guaranteed by the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §§ 1981, 1983.

2. The Court has jurisdiction of this matter pursuant to 42 U.S.C. § 2000e-6, 28 U.S.C. § 1345, and 31 U.S.C. § 6720.

3. The *Zannis, et al.* v. *Arrington, et al.*, CV 83-P-2680-S, action was commenced by Peter J. Zannis, Harold H. Benson, Jr., Michael G. Shepherd, Ancel B. Swindall, Wayne S. Whisenhunt, Jimmy L. Wesson, and Michael Shores on November 7, 1983. On April 2, 1984, this action was consolidated with other actions under *In Re: Birmingham Reverse Discrimination Employment Litigation*, CV 84-P-0903-S. Other individual employees of the Birmingham Police Department have sought and have been granted leave to intervene in these cases as plaintiffs.

4. Plaintiffs are all residents of Jefferson County, Alabama, and all individual plaintiffs are over the age of twenty-one years.

5. Defendant City of Birmingham is a political subdivision of the State of Alabama and an employer within the meaning of 42 U.S.C. § 2000e(b), as amended.

6. Defendant Richard Arrington, Jr., is Mayor of the City of Birmingham and is responsible for the administration and operation of the city government of Birmingham, including the hiring, assigning, and promoting of employees of the City.

7. The defendants enumerated in paragraphs 5 and 6 have received revenue sharing allocations from the United States Treasury pursuant to the nondiscrimination provisions of the State and Local Fiscal Assistance Act of 1972, as amended (31 U.S.C. § 6716 et seq.).

8. Defendant Jefferson County Personnel Board is an agency of Jefferson County established pursuant to the laws of the State of Alabama (Act No. 248 of the 1945 Alabama Legislature, as amended, hereinafter referred to as the "Enabling Act"), and is an employer within the meaning of 42 U.S.C. § 2000e(b). Defendant Jefferson County Personnel Board is engaged in the procuring and screening of applicants for promotion, in the certification of eligibles for promotion to the defendants named in paragraphs 5 and 6, and is further engaged in the administration of a civil service system for such defendants.

9. Plaintiffs are all white, male employees of the Police Department of the City of Birmingham. Pursuant to the provisions of the Enabling Act, plaintiffs have applied for, and taken examinations for promotion to the classifications of Police Sergeant and/or Police Lieutenant of the Birmingham Police Department.

10. Defendants City of Birmingham and Richard Arrington, Jr., have pursued and continue to pursue policies and practices that discriminate against white males and that deprive or tend to deprive white males of employment opportunities in promotional positions within [the] Police Department because of their race and/or sex. Defendants implement these policies and practices, among other ways, as follows:

a. By following a practice of promoting black and/or female employees to the position of Police Sergeant in the Birmingham Police Department in preference to demonstrably better qualified white male employees of the Police Department;

b. By promoting within the Birmingham Police Department black and/or female candidates over white male candidates exclusively on the basis of race or sex without regard to relative qualifications; and

c. By refusing or failing to take appropriate action to eliminate discrimination against white, male employees certified as eligible by the Jefferson County Personnel Board who were and are seeking promotions within the Birmingham Police Department.

11. In accordance with Section 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-6, the United States, through the Department of Justice, has investigated the employment practices of the defendants and has attempted to eliminate the policies and practices described in paragraph 10 above and has attempted to eliminate those policies and practices through negotiation and settlement.

12. The policies and practices of the defendants, described in Paragraph 10 above, constitute a pattern or practice of resistance to the full enjoyment by white males of their right to equal employment opportunities without discrimination based upon race or sex. This pattern or practice is of such a nature and is intended to deny the full exercise of the rights secured by Title VII of the Civil Rights Act of 1964, as amended, and is in violation of the obligations imposed by the State and Local Fiscal Assistance Act of 1972, as well as rights guaranteed by the Fourteenth Amendment to the Constitution of the United States and by 42 U.S.C. §§ 1981 and 1983. Unless restrained by order of this Court, the defendants will continue to pursue policies and practices the same as or similar to those alleged in this Complaint.

WHEREFORE, plaintiff-intervenor prays for an Order permanently enjoining the defendants, Richard Arrington, employees, successors, and all persons in active concert or participation with them from:

(a) making promotions within the Birmingham Police Department based on race or sex without regard to relative qualifications of promotional candidates;

(b) failing to make compensatory payments, to award retroactive seniority, and to award future promotional priority to rejected white, male promotional candidates who have been victimized by the practices described in paragraph 10 above; and

(c) failing to take other appropriate measures to overcome the present effects of past discriminatory policies and practices.

Plaintiff-Intervenor prays for such other additional relief as justice may require, together with its costs in this action.

EDWIN MEESE III
Attorney General

/s/ William Bradford Reynolds
WILLIAM BRADFORD REYNOLDS
Assistant Attorney General

/s/ Charles J. Cooper
CHARLES J. COOPER
Deputy Assistant Attorney General

FRANK W. DONALDSON
United States Attorney for the
Northern District of Alabama

/s/ Mary E. Mann
MARY E. MANN
Special Litigation Counsel

/s/ William R. Worthen
WILLIAM R. WORTHEN
Attorney
U.S. Department of Justice
Civil Rights Division
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 633-3706

[Certificate of Service, dated May 16, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

MOTION OF UNITED STATES TO REALIGN AS PARTY-PLAINTIFF

The United States of America respectfully moves the Court for leave to realign as a party-plaintiff in *Birmingham Association of City Employees, et al.* v. *Richard Arrington, Jr., et al.*, CV 82-P-1852-S, and to substitute its Complaint-in-Intervention filed herewith for its Answer previously filed.

A Memorandum in support of this Motion and Certificate of Plaintiffs' Counsel are attached hereto and incorporated herein.

WHEREFORE, the United States prays that its Motion be granted.

WILLIAM BRADFORD REYNOLDS
Assistant Attorney General

/s/ Charles J. Cooper
CHARLES J. COOPER
Deputy Assistant
Attorney General

FRANK W. DONALDSON
United States Attorney for
the Northern District of
Alabama Federal Courthouse
Birmingham, Alabama 35203

/s/ Mary E. Mann
MARY E. MANN
Special Litigation Counsel

/s/ William R. Worthen
WILLIAM R. WORTHEN
Attorney
U.S. Department of Justice
Civil Rights Division
10th and Pennsylvania Ave., N.W.
Room 5533
Washington, D.C. 20530
(202) 633-3706

[Certificate of Service, dated May 16, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

CAPTION

WHEREUPON, motions in the above styled cause came on to be heard before the Hon. Sam C. Pointer, Jr., Judge, in his chambers at the Federal Courthouse, Birmingham, Alabama, on the 3rd day of July, 1985, commencing at 8:15 a.m., when the following proceedings were had and done:

* * *

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THE COURT: . . . . I think once that is done, that area is going to die and we are going to continue to go forward with the case in other areas, which is essentially what does the decree say and as to what degree does what the decree says constitute a good defense and a reverse discrimination given the law of the country at this time, that is I think the way we are going to end up.

* * *

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MR. JOFFE: Your Honor, I think the only thing that is left, Your Honor, is our motion to compel further interrogatory answers of the private plaintiffs.

THE COURT: Of the private plaintiffs?

MR. JOFFE: Essentially what is at issue is is [sic] how much do they have to tell us about their case before the pretrial order. Essentially our interrogatories say on what do you base your claims that your people are demonstrably better qualified than the people who were promoted and to the extent they answered, they answered by saying all the depositions and

documents produced to date, and we won't tell you whether there's anything else that we intend to rely on because it is premature until the pretrial order.

The problem that we have is that while thousands and thousands of pages of depositions have been taken and documents have been produced, maybe it is our own lack of skill,

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but we haven't found anything in there that goes to the issue that you set forth in your February opinion is the issue to be tried; that is, that the City had knowledge that the people who were promoted were demonstrably less qualified by a job-related test.

So this isn't the kind of case, a slip and fall case where someone has testified they saw a banana peel in the grocery store and we now know what the evidence against us is and we can go out and see if we can get witnesses or testimony to the contrary.

We really have no idea based on their answers on what they are going to rely. It seems to us we are entitled to that so that we can see whether we need further discovery.

MR FITZPATRICK: Your Honor, I disagree with Mr. Joffe's characterization of the issue to be tried. I think your February 19th order speaks for itself as well as the matters that we discussed at the last status meeting.

* * *

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MR. JOFFE: Could the plaintiff indicate how long he thinks his case is going to take? Are we talking about a three-day case or a three-week case?

MR. FITZPATRICK: I think a lot of that depends upon what—perhaps tightening up the February 19th order with respect to those ambiguities that Your Honor referred to earlier. Mr. Joffe seems to think that something is not admissible unless somebody went into Chief Gallant's office and told him about it.

Other points in the February 19th order would lead one to look at whether the information was reasonably available to the City. We believe that there's a lot of information out there that is reasonably available to the City if they would only open their eyes.

And I think that question would

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certainly determine the scope of this trial and the admissible evidence. But, there again, the City also claims that it uses no job-related selection procedures. To what extent is their Consent Decree defense going to be mitigated by the fact that they are not using any job-related selection procedures—as I heard Chief Gallant's deposition two weeks ago, he is using pure quotas.

MR. ALEXANDER: Well, I would not characterize it that way. I would say this, that—it is no surprise I wouldn't characterize it that way. But Chief Gallant has altered his selection procedure in 1981 only to the extent that he now will pick from a supplemental board's certified list.

It is the chief's testimony that the system prior to 1981 did not always yield, in his opinion, the most qualified person for the position and that he is not doing an investigation now any different from the investigation in which he engaged prior to 1981.

And he has, and I think his

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deposition pretty clearly established that, relatively limited knowledge concerning candidates for promotion, both black and white. That has been the way it has been done in the Fire Department.

MR. JOFFE: I think the problem, Your Honor, is our case, the defendants' case I think is relatively simple. We are going to put people on the stand who are going to say they operated under the decree, they believed they had to fill so many positions, that if people were qualified, they were put into that number of positions.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

ORDER

Upon consideration during a status conference of the pending motions in this case, it is hereby ORDERED as follows:

(1) The United States' motion to realign in *B.A.C.E. v. Arrington*, CV 82-P-1852-S is GRANTED to the extent that the United States in good faith believes that actions of the City are discriminatory against the plaintiffs and are neither required nor permitted by the consent decree.

(2) The time within which the defendants must file an answer or responsive pleading to the complaint in intervention of the United States in *Zannis v. Arrington*, 83-P-2680-S is postponed until twenty (20) days following completion of the first trial in this case or such time as otherwise ordered by the court.

(3) The City's motion to quash the subpoenas duces tecum directed to Chiefs Gallant and Laughlin is MOOT.

(4) The City's motion for a protective order is GRANTED, subject to the City's indication during the conference that it is willing to produce a summary describing the general policies and procedures for promotion within the Police and Engineering Departments upon request.

(5) The Personnel Board's motion to amend its answers is GRANTED.

(6) The United States' motion to quash the subpoena duces tecum directed to Richard Ritter is GRANTED insofar as Mr. Ritter need not produce documents listed in Exhibit A to the United States' response to the *Martin*-Intervenors' Rule 34 Requests or internal governmental memoranda. Otherwise, the motion is DENIED.

(7) The United States' motion under Rule 26 to declare that its deposition not be had is GRANTED.

(8) The *Martin*-Intervenors' motion under Rule 37 to compel the production of documents is DENIED in view of the court's unwillingness to compel disclosure of documents listed in Exhibit A and internal governmental memoranda and the United States' agreement to produce documents listed in Exhibit B. Following the deposition of Mr. Ritter, production of these privileged materials will be considered upon a showing of need for specified documents.

(9) The *Martin*-Intervenors' motion under Rule 37 to compel further interrogatory answers from plaintiffs or to limit evidence is DENIED, subject to plaintiffs' disclosure by September 1, 1985, of witnesses and documents they anticipate using at trial, to be followed by similar disclosure from the defendants by September 25, 1985. Accompanying each anticipated witnesses' name there shall be a brief paragraph describing the anticipated testimony.

(10) A discovery cutoff of October 1, 1985, is established in this case.

This the 8th day of July, 1985.

/s/ Sam C. Pointer, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

[In re: Wilks, *et al.* v. Arrington, *et al.*]

MOTION TO INTERVENE AND COMPLAINT IN INTERVENTION OF CHARLES E. CARLIN

1. Charles E. Carlin moves the Court for leave to intervene as an additional party plaintiff.

2. Carlin is a white male Fire Lieutenant of the Birmingham Fire and Rescue Service who has been denied promotion in a manner similar to the original plaintiffs in that he was denied promotion to the classification of Fire Captain due to his race.

3. Upon the granting of this motion, Carlin adopts by reference all of the allegations of the original Complaint in *Wilks v. Arrington* by reference and prays for the same relief as requested therein for himself.

WHEREFORE, Carlin respectfully moves for leave to intervene as an additional party plaintiff and further requests that he be permitted to adopt the original Complaint as his Complaint in Intervention.

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.
Attorney for Proposed
Intervening Plaintiff
Charles E. Carlin

[Certificate of Service, dated July 10, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

ORDER

Charles Carlin's motion to intervene in *Wilks v. Arrington*, CV 83-P-2116-S is hereby GRANTED. Because the *Wilks* case will be involved in the first trial of these consolidated cases, defendants are directed to answer or respond to the complaint in intervention within the time required by law.

This the 9th day of August, 1985.

/s/ Sam C. Pointer, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2116-S

ANSWER OF DEFENDANT JEFFERSON COUNTY PERSONNEL BOARD TO THE COMPLAINT IN INTERVENTION OF CHARLES E. CARLIN

Comes now one of the defendants, the Personnel Board of Jefferson County, Alabama (the "Board"), and answers the complaint in intervention of Charles E. Carlin as follows:

1. The Board adopts and realleges all the averments of its Answer to the original Complaint of Robert K. Wilks consisting of paragraphs 1 through 20 and adopts all of its previous Amendment to Answer thereto consisting of paragraphs 21 through 25 as if all 25 paragraphs were set forth in their entirety herein. Copies of both the Answer and Amendment to Answer are attached hereto.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

Attorneys for the Personnel
Board of Jefferson County, Alabama

OF COUNSEL:

JOHNSTON, BARTON, PROCTOR,
SWEDLAW & NAFF
1100 Park Place Tower
Birmingham, Alabama 35203
(205) 322-0616

[Certificate of Service, dated August 22, 1985, and attachments omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

ANSWER OF DEFENDANT-INTERVENORS TO THE COMPLAINT IN INTERVENTION OF CHARLES E. CARLIN

Defendant-intervenors John W. Martin, Major Florence, Ida McGruder, Sam Coar, Eugene Thomas and Charles Howard, individually and on behalf of all others similarly situated, for their answer to the Complaint in Intervention filed by Charles E. Carlin:

1. Adopt by reference paragraphs 1 through 12 of their Amended Answer to the original Complaint.

2. State that they are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 2 of the Complaint in Intervention.

3. Adopt by reference the First, Second and Third Defenses of their Amended Answer to the original Complaint.

WHEREFORE, defendant-intervenors pray that plaintiff-intervenors take nothing by their suit, that judgment be entered for the defendants and that defendant-intervenors be awarded their costs of suit and reasonable attorneys' fees.

August 29, 1985

/s/ Thomas D. Barr
THOMAS D. BARR
ROBERT D. JOFFE
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202) 371-1212

Attorneys for Defendant-Intervenors

[Certificate of Service, dated August 29, 1985, omitted]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

[Wilks v. Arrington; Civil Action No.: CV 83-P-2116-S]

ANSWER OF DEFENDANTS RICHARD ARRINGTON, JR. AND THE CITY OF BIRMINGHAM TO THE COMPLAINT IN INTERVENTION OF CHARLES E. CARLIN

For answer to the Complaint in Intervention, filed by Charles E. Carlin, allowed by order of August 12, 1985, these defendants say as follows:

FIRST-FIFTH DEFENSE

These defendants adopt by reference the affirmative defenses 1 through 5 of their original answer in *Wilks v. Arrington*.

SIXTH DEFENSE

To the extent this action is predicated upon a claim of racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended, ("Title VII"), plaintiff has failed to satisfy the necessary statutory conditions precedent to suit. With respect to plaintiff's EEOC charge 042841005 filed by plaintiff on February 22, 1984 claiming he was discriminately denied a promotion to Fire Captain on September 10, 1983, plaintiff failed to file suit within 90 days of receipt of his right-to-sue letter. The EEOC issued plaintiff a notice of Right to Sue and Determination Letter on April 24, 1984, and plaintiff failed to file his Complaint in Intervention until July 12, 1985. Thus, to the extent plaintiff Carlin's complaint is based on acts encompassed in his February, 1984, EEOC charge, such claims are barred and may not be litigated.

With respect to plaintiff's second EEOC charge 042850912 which was filed on March 4, 1985, which claims plaintiff was "not promoted because a black was promoted on the basis of his race to Fire Captain", plaintiff failed to file a timely charge of discrimination within 180 days of the alleged discrimination as required by § 706(e) of Title VII. The only promotion of a black to the Fire Captain's position, the promotion on September 10, 1983, of Tony Jackson, occurred over 180 days prior to the filing of plaintiff's second EEOC charge. Thus, to the extent that plaintiff Carlin's complaint is based on acts not occurring within the 180-day period prior to the filing of his EEOC charge, such claims may not be litigated because they are time-barred.

SEVENTH DEFENSE

To the extent the Complaint in Intervention is predicated upon 42 U.S.C. § 1981 and 42 U.S.C. § 1983, plaintiff has failed to satisfy the necessary statutory conditions precedent to suit. Plaintiff's claims under 42 U.S.C. 1981 are time barred under the applicable one-year Alabama Statute of Limitation.

EIGHTH DEFENSE

To the extent plaintiff's complaint raises any issue other than his failure to be promoted to Fire Captain in September, 1984, such issues are not like or related to plaintiff's second charge of employment discrimination filed with the EEOC, EEOC charge No. 0428509212, and cannot be litigated in this action.

NINTH DEFENSE

Plaintiff's second EEOC charge, EEOC Charge No. 0428504212 which was filed March 4, 1985, raises no issues which were not addressed in his first EEOC charge, Charge No. 042841005 filed on February 24, 1984.

TENTH DEFENSE

Plaintiff lacks standing to bring any claim against these defendants.

ELEVENTH DEFENSE

For further answer to the Complaint in Intervention, these defendants say as follows:

1. Paragraph 1 does not require a response.

2. These defendants admit Carlin is a white male Fire Lieutenant of the Birmingham Fire and Rescue Service and admit that they consider race in promotion and employment decisions, to the extent required by the provisions of the consent decree heretofore entered in Civil Action Nos. 75-P-0666-F, 74-Z-12-S, and 74-Z-17-S. These defendants deny the remaining allegations of paragraph 2 of the Complaint in Intervention.

3. These defendants adopt the Sixth Defense of their original Answer in *Wilks* v. *Arrington* in specific response to paragraph 3 of the Complaint in Intervention.

4. Except as herein expressly admitted the allegations in the Complaint in Intervention are denied.

/s/ James K. Baker
James K. Baker

/s/ Eldridge D. Lacy
James P. Alexander
Robert K. Spotswood
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[Certificate of Service, dated August 29, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

MOTION OF THE UNITED STATES FOR PRE-TRIAL EVIDENTIARY RULING ON BURDENS OF PROOF

COMES NOW THE UNITED STATES OF AMERICA, Plaintiff-Intervenor herein, and files this Motion for a Pre-trial Evidentiary Ruling on the parties' respective burdens of proof at trial. This Motion is premised on the United States' ability in its case-in-chief to show that race was a significant factor in the promotional decisions at issue. Once this direct evidence of discrimination has been introduced, it is the position of the United States that the burden then shifts to the City to establish that its conduct was mandated by the decree, which requires a showing that the black promotees were not demonstrably less qualified than the white plaintiffs.

A Memorandum in support of this Motion is attached hereto and incorporated herein by reference.

WHEREFORE, the United States prays that its Motion be inquired into and granted. Moreover, because of the importance of this Motion to future discovery efforts and trial preparation, the United States requests this Court to set an expedited briefing and hearing schedule on this Motion.

Respectfully submitted,

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Assistant Attorney General

CHARLES J. COOPER
Deputy Assistant
Attorney General

FRANK W. DONALDSON
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[Certificate of Service, dated September 14, 1985, Memorandum and Attachments omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

BEFORE THE HONORABLE SAM POINTER
STATUS CONFERENCE
COMMENCING AT: 8:30 A.M.
ON THE 17TH DAY OF SEPTEMBER, 1985

* * *

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THE COURT: Let me respond there. I think the trial should be held in December, and it seems to me that I should allot a block of time to the plaintiffs and require that they

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identify — when we come back to the time — the time with the identification of those they reasonably anticipate calling during that period of time. I say that would presumably be the plaintiffs and the United States because there's kind of a joinder in that position.

In terms of the block of time, if I look at the paperwork that gets generated and amount of discovery, it would say we better set aside several weeks or months, and I just — I have a hard time imagining that that's really required in order to deal with the kind of issues that have to be dealt with here, and it seems to me that essentially about four days ought to be adequate for the plaintiffs to put on their case, plaintiffs and defendants put on their case, and that is on the basis that the cross-examination of any witness would be no greater than the amount of direct testimony as a rule of thumb in terms of simply planning on how you — what you want to use.

And it's hard for me to understand how it would actually take more time than that

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for the plaintiffs to put on their position. I'm not yet — I'm not comfortable with the concept of how much time the defense is going to need.

MR. ALEXANDER: The truth of the matter is, Your Honor, I suspect that the defense witnesses are going to be the same folks who are talking from their side in that we will have — I mean I don't anticipate our case as a two-hundred-person list. It's not. It's a very small group of people.

MR. FITZPATRICK: Your Honor, I think four days — and I don't think the Court is inviting me to differ with you.

THE COURT: No, I'm inviting you to differ.

Q. I think four days is a bit ambitious. This, as we view it, is essentially the trial of sixteen disparate treatment cases, and I would estimate that the average — I don't — Your Honor's experience in trying disparate treatment cases, I would say probably a day and a half to two days on average for a single case, and true

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we have the same decisionmakers here.

THE COURT: That's the reason why it doesn't take that long because you've got the same decisionmakers.

MR. FITZPATRICK: But we've got sixteen people, sixteen sets of qualifications, corresponding qualifications of the black promotees to consider. We do have a lot of deposition testimony which can be submitted, and I presume Your Honor is not going to want all of that read in open court, if we can just submit pages.

MS. MANN: Your Honor, the United States again is looking at this trial with — there's more questions for us. I guess the bottom line is that we need some guidance from the Court as to what the burden of the plaintiff is going to be. If,

for example, we win on our burden of proof motion, I think that the Court has allowed more than enough time for the plaintiffs to put on their case.

MR. ALEXANDER: If you win on that, I don't need to show up.

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(Laughter).

THE COURT: Well, I think the plaintiffs have the ultimate burden of persuasion.

MS. MANN: Well, Your Honor —

THE COURT: That doesn't help you, does it?

MR. FITZPATRICK: The City has the burden of proving their defense that's our —

MS. MANN: We certainly agree in terms of the ultimate burden of persuasion, but I think a real question we need addressed and we would like to have it addressed through the Court setting a briefing schedule and a time for a hearing on this motion is who is going to have the burden of proving either the plaintiffs were demonstrably better qualified or that the individuals who were promoted were not demonstrably less qualified. And, of course, it's our position that the burden is on the defendants to prove the latter, but in terms of how that burden works out will make a real difference as to how long it takes us to put on

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our case in chief.

MR. ALEXANDER: Your Honor, I think one problem with the United States' motion which I've only cursorily read is that it assumes consent decree construcion [sic] — it's predicate is consent decree construction which we believe to be disputed. I don't believe you can separate consent decree construction from the issues raised in their motions, and it may well be the motion for partial summary judgment may have to be decided at the same time.

THE COURT: I'm not sure I'm totally following you.

MR. ALEXANDER: Well, it seems to me that they treat section two or paragraph two of the consent decree as an operative limitation on the goals provisions. We don't think it's due to be so construed, and that colors, if you will, their burden and allocation of proof arguments which in effect are a great deal more than that.

MR. JOFFE: Your Honor, I don't think the Court can resolve the burden of proof without making the defendant rulings on the

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meaning of the decree which you've indicated you wanted to wait until either trial or summary judgment motion. My suggestion would be that we deal with it in a summary judgment motion. If the motion is unsuccessful, then, I don't disagree that these issues can be decided at the outset of trial, but I think with discovery still uncompleted we are just too far ahead to deal with that.

THE COURT: Well, I think essentially what I have attempted to do up to this point is to say until I knew what the facts were I preferred not to engage in sort of philosophy resolution of some matters on the burden of proof or on the construction of the decree because those might in fact on any particular case be irrelevant, and it's been more on that thesis that I have delayed making that kind of ruling until I saw that the ruling had to be made.

MS. MANN: Your Honor, we think that through the depositions that have been taken to date that we do have sufficient facts from which

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Your Honor could make a ruling on these questions. We've taken all of the plaintiffs' depositions. We've taken all of the affirmative promotees depositions. We've taken the heads of the departments. We've taken some of the supervisory personnel. We've taken — we're doing the Mayor right now. We've taken the head of the City office of personnel, and we believe

that the crucial depositions have been taken. It may be that Your Honor needs more information so that you can satisfy yourself.

THE COURT: Well, my sense is that that information is what I need to have, but I'm not sure that it's due to be presented on a summary judgment because I think that information that this — that there are going to be sufficient disputes at least in terms of the conclusions one would draw that would make summary judgment inappropriate, but it sounds like that's the kind of information that's due to be presented at a trial.

MR. FITZPATRICK: Your Honor, one further question remains is whether the decree

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is going to be construed from its four corners or whether the Court is going to consider parole evidence. I don't know if that's a question that can be resolved prior to trial or not, but that would certainly help us in culling our witness list.

THE COURT: I would say there is some ambiguity in the consent decree. And to — it may be that parole evidence, therefore, is going to be of some significance. On the other hand, there are certainly areas of the consent decree that are without ambiguity.

MS. MANN: Would the Court entertain a pretrial motion on that issue?

THE COURT: I'll entertain any motion.

(Laughter).

THE COURT: I don't have much choice I don't think. I'm just not sure how well it's going to be able to be addressed in advance. That's the difficulty.

* * *

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THE COURT: Well, I think the plaintiffs need to assume for purpose of the trial that the burden of proof is going to go against you. You have to prepare for trial on that basis.

MR. ANGUS: Well, if the burden for the plaintiff is to demonstrate that discrimination has occurred, what further burden does the plaintiff bear at that point?

THE COURT: Well, I think you also better be prepared to deal with the demonstrably better qualified issue and establish that blacks were promoted when there were demonstrably better qualified whites there on the list that the decision makers knew to be demonstrably better qualified.

MR. ANGUS: Your Honor, have you addressed or read at all the brief we filed yesterday concerning the pretrial evidentiary ruling or burden of proof?

THE COURT: No.

MR. ANGUS: I think this case really calls for some unique decisions in the areas of

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burden of proof. I mean traditionally you've got the McDonnell-Douglas standard, and you've got the standard where prima facie is not needed where you can show overt discrimination. There are shifting burdens of production and persuasion. If the United States is to bear the burden in this case of showing not only that a racial decision was made in an individual case but also that we bear the burden of showing a demonstrably better or less qualified person, I think that's a unique — unique approach for a burden for a plaintiff in a Title 7 case.

What makes this case unique is the assertion of an affirmative defense of the consent decree by the defendants. And I — in our view, the motion we filed yesterday could have a significant bearing on what presentation of burden of proof is made by the United States.

THE COURT: It may. I haven't looked at it. I'm just saying in terms of preparing for trial I think you have to prepare for trial on the basis that the issue there can go against you.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	CIVIL ACTION NO.
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CV 84-P-0903-S

CAPTION

THE ABOVE-STYLED CAUSE came on to be heard before the Honorable Sam C. Pointer, Jr., in his Chambers, at the Federal Courthouse, Birmingham, Alabama, commencing at 5:00 P.M. on the 31st day of October, 1985.

* * *

[Page 5]

I'll take first the last item, this matter of the motion for ruling on the pretrial

[Page 6]

evidentiary burden. I have indicated already, and I simply continue to stick by that, that the United States and the plaintiffs should anticipate that they will have the burden at least of going forward with the evidence with respect to establishing that the plaintiffs were demonstrably better qualified than the person selected by a job procedure, by a validated job procedure. And not only that but to try to demonstrate that the City had knowledge of such a difference.

I recognize the problem that remains about whether if they didn't have it it was immediately at hand and they closed their eyes to it, and I sort of left that open. But I think that's the position that the plaintiffs and the United States should take.

MR. ANGUS: Judge —

MS. MANN: Judge — at least we speak with one voice. Last time we were before the Court Your Honor indicated that you had not had an opportunity to review our motion, and in fact it had been filed merely the day before the

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hearing. Are we to take your statements today as a ruling on the motion, or is this just your preliminary —

THE COURT: No, I'm saying I'm not going to make a ruling on the motion in terms of actually making a decision that would in effect constitute the decision of the Court as to where the burden of proof is. I'm saying that the plaintiffs and the United States need to proceed on the basis of that, and I'll continue to be looking for case law up until the time of a decision having to be made, and we may get some case law guidance, who knows, before then that's better than what it is now.

But until something else happens, you have to work on the basis that that is going to be your burden.

MR. ANGUS: Your Honor, James Angus with the Department of Justice. May I ask a question, are you saying that after reading our brief you haven't been persuaded by any legal authority we've set forth that the motion for a pretrial evidentiary ruling is well taken at

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this time or is supported in law?

THE COURT: I'm saying that I think there is a good debate on what the rule of law is, and I don't think the law is clear one way or the other, and I think that we may get some further guidance by the time of a decision, but that subject to that occurring, the plaintiffs and the United States need to proceed on the basis that that's what the Court is going to be looking for you to do.

MR. ANGUS: I guess the Court is saying then we would expect a ruling of that before a decision on the merits but not before the proceeding with the presentation of evidence at the trial?

THE COURT: That's correct. In limine motions can be useful obviously, but particularly in areas in which it's not clear what the law is and where the law may change, I think it's inappropriate to try to give any further guidance other than what I've done which is a preliminary guidance that goes against you such that you should proceed on the basis,

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prepare your case on the basis that you are going to have that burden.

MR. ANGUS: So the burden we should proceed on is demonstrably better qualified in accordance with job related selection procedures?

THE COURT: That's right. With a related or subissue as to whether the defendants or the City officials had that information or perhaps had it reasonably available to it which is what I outlined, I guess was back in February.

* * *

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THE COURT: Well, I think there is at least a fair shot in this case that after the plaintiff and United States put on their evidence there is going to be a judgment under Rule 41. If the law continues to be as I viewed it to be as of approximately February of this year, I don't know what plaintiffs and United States can come forward with, but I wouldn't be surprised if that is the situation, that the plaintiffs and United States simply can't win on that kind of standard. Now, if that be true, then I'm just — I'm concerned about this expansion or continued expansion even though it's responsive to their witness list.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

MOTION IN LIMINE OF UNITED STATES TO EXCLUDE CERTAIN TESTIMONY AND EXHIBITS LISTED IN DEFENDANTS' JOINT LIST OF TRIAL EXHIBITS AND WITNESSES

On November 18, 1985, defendant-intervenors, the City of Birmingham, and Richard Arrington, Jr. served on the United States and private plaintiffs a "Joint List of Trial Exhibits and Witnesses." This voluminous list reveals that defendants intend to present at trial a large amount of evidence that should be deemed inadmissible by the Court. The objectionable evidence falls into two categories: (1) evidence intended to establish a "History of Discrimination" in the City of Birmingham; and (2) evidence extrinsic to the City Consent Decree, intended to ascribe to the Decree a meaning that goes beyond the plain language of its four corners.

Evidence of historical discrimination is not at all probative of the issues that are essential to a determination of this action and will only serve to unnecessarily prolong the trial process. Pursuant to Rules 401 and 402 of the Federal Rules of Evidence or, in the alternative, Rule 403, such evidence should be excluded. Evidence that is extrinsic to the Decree and intended to support an interpretation that is contrary to the express language of the Decree is also inadmissible based upon firmly established rules regarding construction of consent decrees.

In the interest of clarifying the issues for trial and expediting the trial process, the United States seeks pre-trial rulings

on these evidentiary matters. The grounds for this Motion and the specific evidence sought to be excluded are set forth in the accompanying supporting Memorandum.

WHEREFORE, the United States prays that the Court grant its Motion in Limine seeking a Pre-Trial Ruling that the exhibits and testimony listed in the Memorandum attached to this Motion be excluded from the trial of this case.

Respectfully submitted,

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[Certificate of Service, dated December 3, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

STATUS CONFERENCE
BEFORE THE HONORABLE SAM POINTER
COMMENCING AT 4:46 P.M.
ON THE 5TH DAY OF DECEMBER, 1985

* * *

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There's a motion by the United States, a motion in limine to exclude certain testimony and exhibits that the defendants have listed. This is in two categories. One would be evidence relating to a pattern of racial discrimination in the City, and evidence extrinsic to the decree bearing upon the interpretation or meaning of the decree.

Insofar as the matter of restricting evidence on pattern of racial discrimination, I will deny the motion to exclude, but I assume that through the discovery devices that have already been gone through that will be presented for the most part simply on the basis of some stipulations that have already been dealt with,

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that a — a lot of that I believe has been covered in that area, and I certainly don't anticipate any prolonged new or live evidence, so to speak, dealing with that subject matter. I can understand that it may be of some significance at a time, particularly an appellate court reviewing the matter to be aware of that evidence.

* * *

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Now, there's a motion by the plaintiffs to deem things admitted. We've gone through this once before.

MR. FITZPATRICK: Your Honor, we are more or less in the same position we were after we got the first set of responses where they didn't admit, deny or object, but they told me all about the consent decree, and —

THE COURT: I'm going to treat it that they have acknowledged that race was a factor and was significant in the sense that or subject to the limitation that, they believed that they were operating — that they were bound by the consent decree to take race into

[Page 14]

consideration in those areas in which there was underrepresentation, and in fact they did so.

MR. FITZPATRICK: Your Honor, what I'm concerned about is the fact that in — in using preferences, racial preferences that race significantly impacted in the final decision.

THE COURT: I think I've told you —

MR. FITZPATRICK: Okay.

THE COURT: — what they've admitted, and they have admitted it in the context of taking it into account certainly as a significant factor in those areas in which there was underrepresentation, believing that they were bound to consider it in that light and were — had certain obligations under the consent decree.

N what you're really talking about is a legal theory. They are admitting the fact. What both sides are arguing about is the legal theory. Does that mean that race was a motivating factor, or does it mean that the consent decree was the motivating factor? That's what you are really arguing about. They are admitting the underlying objective fact.

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They are declining to admit the — what they perceive to be your intent and your [sic] acknowledging this by saying, no, I want you to say just flat-out it was race.

MR. FITZPATRICK: They did it.

THE COURT: And I think they've done what you can fairly ask them to do, and they are bound in the way in which I've described it to have admitted that. So I'm going to deny any further — or refuse to grant any further order in this way. They are bound to have admitted what they've admitted, and it has the impact as far as I'm concerned of admitting that race was taken into account, was a significant factor in the context of this — of doing it by virtue of what they believed the decree calls for.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

CAPTION

THE ABOVE-ENTITLED CAUSE came on to be heard before the Hon. Sam C. Pointer, Judge, at the United States District Courthouse, Birmingham, Alabama, on the 16th day of December, 1985, commencing at 9:08 a.m., when the following proceedings were had and done.

* * *

[Page 3]

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[Page 4]

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[Page 5]

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* * *

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MR. ANGUS: Your Honor, that brings us to where this started with Mr. Whiteside. Government — Plaintiff's Exhibit Number 23 is the stipulations that have been entered into among the parties, and it covers a variety of areas. By entering into this stipulation, the United States for purposes of — or to the extent that this document reflects historical data is not admitting relevancy of such data.

Also attached to those stipulations are the examination scores, score sheets of the Personnel Board as well as the roster of eligibles as a result of each of the exams, and we would, again, reassert the relevancy of test scores to this proceeding and ask the Court to admit those into evidence.

MR. ALEXANDER: Your Honor, by stipulating — by agreeing to the stipulation, we certainly do not concede the relevancy of the test stores [sic] and reserve our right to object to those.

THE COURT: All right. I think I

[Page 26]

understand Exhibit 23, the parties are agreeing that certain facts are true, however, the United States, for example, does not agree that certain historical data would be relevant. The City does not agree that certain matters relating to test scores, for example, would be relevant, but the parties are saying the facts themselves are true.

MR. ANGUS: That's correct.

MR. JOFFE: Your Honor, we join in the City's objection and also note that our objection extends to the rank number which appears in the material.

THE COURT: I understand that.

MR. FITZPATRICK: Plaintiffs join the United States' offer.

MR. ANGUS: Your Honor, we're — my understanding from appearances in chambers with respect to burdens of proof in this case is that the Court had indicated the government would have to show that the City had actual knowledge of test scores before that information would be admissible or considered by the Court. We would just note on the record our objection to that burden and assert that a plaintiff in a Title 7

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case generally enjoys a very wide latitude in some of the evidence it can present to the Court for purposes of proving a prima facie case of discrimination, but holding us to a burden of showing actual knowledge is a burden that we believe is unique in Title 7.

THE COURT: I understand the nature of the argument.

* * *

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MS. MANN: Your Honor, the next exhibit the United States would move into evidence is Exhibit Number 41 which is the City consent decree in U. S. Versus Jefferson County.

MR. FITZPATRICK: Your Honor, it's no secret that the plaintiffs would take the position that they are not bound by the City decree and that the decree does not affect our rights and by — by the admission of this, we don't want to be construed as waiving that position.

THE COURT: You certainly are not waiving it.

* * *

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Q. Prior to the consent decree being entered in 1981, how were promotions made in the fire department, say, to lieutenant?

A. They were made on the basis of promotional examinations.

Q. Based on the rank order?

A. Yes, sir.

Q. Just the rank order?

A. As far as I know.

Q. And after the entry of the consent decree, how did that change?

A. After the entry of the consent decree, the promotions were made, it's my understanding, on the basis of the consent decree's quotas or goals that were agreed to by the City and the

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Justice Department.

Q. Were the rank orders still used but separate for blacks and for whites?

A. That is my understanding.

Q. Do you know of any instance where the rank order wasn't followed?

A. I personally don't know, sir.

Q. Prior to the entry of the consent decree, was it necessary to have an eighty-five on the performance evaluation before you could take the test?

A. Prior to the time that we quit filling out the performance or the potential performance evaluation reports for promotion, the promotion part of the performance evaluation, it's my understanding that those required an average of an eighty-five on the evaluation.

Q. Before you were eligible to take the test?

A. Yes, sir. It has been done a lot of different ways in the past, but that was — at one time, that was used.

Q. And who gave the scores, the performance evaluations?

A. Other officers.

* * *

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Q. You said you would like to know in addition to how a person ranked on the test his number of years of seniority, and that the practice that you were aware of was that the Personnel Board gave one point for every year of seniority; is that correct?

A. That's my understanding.

Q. Do you know why one year equates with

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one point?

A. I have no idea.

* * *

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ROBERT C. WOOD,

being first duly sworn, was examined and

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testified as follows:

* * *

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Q. Would you describe the job duties and responsibilities of a lead worker?

A. Well, the lead worker is usually a senior person on the shift at the station, and as a general rule, lead worker follows seniority strictly throughout the entire station.

In other words, a person could be a — the third person or fourth person out on a

[Page 149]

certain station as far as seniority at that station, and an oldest person at the top either retire or get promoted or something like that and that person, regardless of whether he is already working on a shift with another lead worker, would assume that next position and move to another shift or something like this. This is a general way we have been doing this.

This is pretty much at the discretion of the captain at the station as to who is selected as lead worker, but it does carry a pay incentive of five percent.

But the purpose of the lead worker to begin with was to have all drivers or engineers that operate the apparatus lead workers so that they would obtain this little pay incentive because they would fill in in the absence of the ranking officer on the shift, whether it be the lieutenant or the captain on that particular apparatus. So they do assume that duty. They are the acting officer in the absence of the officer in charge.

* * *

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Q. Do you know who the first black to receive a paramedic license was?

A. In the City of Birmingham?

Q. In the City of Birmingham Fire and Rescue Service?

A. I would have to say James Lester, I believe.

Q. Do you know when that was?

A. I had James in some classes over there. It had to be in the late '70's somewhere. I can't remember the exact time frame.

* * *

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Q. Do you have any judgment as to how many black lead workers there are currently throughout the department?

A. I know there's one at Number 6 because I set him up lead worker, but that is Leslie Garner. Probably be the only one that I can speak for with any validity at this time. I am not that really sure about the other areas.

Q. When did you set up Leslie Garner as lead worker?

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A. Right before I was promoted to chief when I was captain at Number 6.

Q. This would have been sometime in 1984?

A. Oh, no. It might have been '83.

Q. '83?

A. Previous to that, yes.

Q. You testified that paramedics on a rescue unit are lead workers in a sense. Would you distinguish between a paramedic lead worker and an engine company lead worker as far as the type of work and responsibilities that each has?

A. The engine lead worker takes over the job of managing that fire company on all the calls that they respond to and the same thing essentially happens on a rescue unit.

The problem with a rescue unit is that they probably would run with more than one engine company and a larger number of personnel be involved. And generally when the rescue unit runs on the advanced life support calls, they would more or less — their evaluation of the situation would probably carry a good bit of weight as to how the situation was handled overall.

This would be one area where the

[Page 172]

medic lead worker on the rescue unit would have a lot of influence on the situation on probably the engine personnel as well as anybody else. But if you turn the tables around and the rescue unit was running with the engine company and there was a fire, then they would fall or become subject to the lead worker on the engine would be the person taking the command.

Q. Do you have a judgment based on your experience as to whether being a paramedic is more or less valuable in terms of being qualified for a lieutenant than being a lead worker on an engine?

A. I think they are parative. I think being a medic is very valuable in all aspects of it. I think being a lead worker is very valuable and I would look at them both as being very important factors in this.

* * *

[Page 180]

Q. . . . I think you said in response to a question by Ms. Mann that there was no strict seniority requirement to become a paramedic. Does seniority, however, play a role in that determination?

A. As far as who gets the training?

Q. Yes.

A. Not necessarily, no, sir.

Q. What is the average seniority in your

[Page 181]

view for the people that go into paramedic training?

A. Over the last few classes that I had any contact with at all, there have generally been younger personnel, four to six, eight years of service.

* * *

[Page 183]

Q. At the time you joined the Birmingham fire department in 1960, were there any blacks in the fire department?

[Page 184]

A. No, sir, I don't believe so.

Q. Do you have any knowledge of there being any black fire fighters in the Birmingham fire department prior to your joining?

A. No, sir. I don't have any knowledge.

MR. FITZPATRICK: Your Honor, may I have a continuing objection to relevance about these statistical matters?

THE COURT: All right. I overrule.

* * *

[Page 185]

LAWRENCE A. SMITH,

being first duly sworn, was examined and testified as follows:

* * *

[Page 205]

Q. Based on your experience, Captain, with the department and with drills and training, do you have an opinion as to whether the drivers test measureds [sic] job-related skills, knowledge and the abilities of fire fighters?

* * *

[Page 220]

Q. . . . I think you testified that Leslie Garner was the first black. And it was not clear to me whether you meant he was the first black to pass the drivers test or the first black hired by the fire department?

A. That is correct in both instances.

Q. That is, in the period from 1941 until he was hired in 1968, there were no other blacks?

A. I do not recall of any, sir.

* * *

[Page 222]

Q. (BY MR. FITZPATRICK:) Captain, is the fire lieutenant expected to instruct his personnel on the use of the apparatus?

A. Yes, sir.

Q. Is the information which is tested in the drivers test knowledge which is useful to the fire lieutenant in performing his duties?

A. Yes.

* * *

[Page 244]

FLOYD E. CLICK,

being first duly sworn, was examined and testified as follows:

* * *

[Page 245]

Q. When did you begin your employment with the Birmingham Fire and Rescue Service?

A. November the 25th, 1968.

Q. And from November 25th, 1968 until the present time, is your seniority uninterrupted?

A. That is correct, sir.

* * *

[Page 251]

Q. During the time that you were the acting officer at the station, would you describe what responsibilities were yours as the acting officer?

A. Well, sir, I had to see that the shift ran smoothly. I had to see that the men did their work and did it properly. I had to

[Page 252]

fill out all the reports that were necessary, had to make all the decisions that the officer would make had he been there.

Q. Could you tell me between the time you became a lead worker and May of 1982 approximately how many shifts did you serve as acting officer at Station 18?

A. At least a hundred and fifty, sir.

* * *

[Page 268]

JAMES DOUGLAS MORGAN,

being first duly sworn, was examined and testified as follows:

* * *

[Page 269]

Q. When did you begin working with the Birmingham Fire Department?

A. November the 25th, 1968.

Q. And have you been continuously employed with the fire department since 1968?

A. Yes, I have.

* * *

[Page 271]

Q. Apart from any in-service training that you may have received with the Birmingham Fire Department, have you taken any courses or pursued any education in fire science or fire related matters?

A. I have a fire science degree.

Q. Where did you get that degree?

A. From Jefferson State College.

Q. And what type of degree is that?

A. It's an applied science degree in fire science.

Q. And when did you receive that degree?

A. In 1973.

Q. Do you recall what your grade point average was?

A. 3.64.

Q. Is that on a four-point system?

A. On a four-point system.

[Page 272]

Q. When you received this degree from Jeff State, did you receive any sort of pay increase from the fire department?

A. I received a five percent educational increase.

Q. Do you recall who your instructors were in the fire science program at Jefferson State?

A. They were Battalion Chiefs with the fire department and Captains that were assigned to drilis and training.

* * *

[Page 282]

Q. Have you ever taken a competitive examination for the position of Fire Lieutenant in the Birmingham Fire Department?

A. Yes, I have.

Q. On how many occasions have you taken the Fire Lieutenants examination?

A. I've taken it every time since I was able to take it in 1974.

* * *

[Page 307]

GENE E. NORTHINGTON,

being first duly sworn, was examined and testified as follows:

* * *

[Page 309]

Q. When did you beginning [sic] working with the Fire and Rescue Service?

A. November 25th, 1968.

Q. Have you worked for the service continuously since that date?

A. Yes, sir, I have.

* * *

[Page 340]

JOEL [ALAN] DAY,

being first duly sworn, was examined and testified as follows:

* * *

[Page 341]

Q. When did you begin working with the Birmingham Fire Department?

A. A long time ago. November the 27th, 1961.

Q. Since November '61, has your seniority with the department been uninterrupted?

A. Continuous and uninterrupted for twenty-four years.

* * *

[Page 346]

Q. Have you ever taken a competitive examination for the position of lieutenant?

A. Yes. In 1980 and in 1982.

* * *

[Page 359]

VINCENT JOSEPH VELLA,

being first duly sworn, was examined and testified as follows:

* * *

[Page 360]

Q. And are you currently employed, sir?

A. Yes, ma'am. I'm employed at the Birmingham Fire and Rescue Service.

Q. When did you begin working for the fire department?

A. On February the 26th, 1968.

Q. Have you been continuously employed with the fire department since that date?

A. Yes, I have.

* * *

[Page 398]

LANE L. DENARD,

being first duly sworn, was examined and testified as follows:

* * *

[Page 399]

Q. When did you begin working with the fire and rescue service?

A. February 2, 1971.

Q. Have you worked continuously with the fire department since that date?

A. Yes.

* * *

[Page 423]

Q. And you have subsequently been promoted to Lieutenant, have you not?

A. Yes.

* * *

[Page 425]

ROBERT K. WILKS,

being first duly sworn, was examined and testified as follows:

* * *

[Page 426]

Q. When did you begin working with the Birmingham Fire and Rescue Service?

A. February the 26th, 1968.

Q. Is that an uninterrupted seniority date?

A. Yes, it is.

* * *

[Page 433]

Q. And as of April 1982, had you ever served as an acting officer?

A. Yes, I have.

Q. On about how many occasions have you served as an acting officer as of that time?

A. Approximately a hundred and fifty shifts.

* * *

[Page 435]

Q. Have you ever taken the competitive examination for the position of Fire Lieutenant?

A. Yes, I have.

Q. Have you taken it the last three times it was given?

A. Yes, I did.

Q. And did you take it on earlier occasions as well?

A. Yes, sir.

Q. Did you pass each of the last three tests that you took?

A. Yes, sir, I did.

Q. After the 1982 exam, were you informed of your rank on that exam?

A. Yes, I was.

Q. And what was your rank on the '82 register?

A. 8th.

Q. Did you take the '83 test?

A. Yes, I did.

Q. What was your rank on the register?

A. Third.

Q. Did you take the '84 test?

A. Yes, I did.

[Page 436]

Q. And what was your rank on the '84 register?

A. Nine.

Q. Is that the list that's currently in effect?

A. Yes, it is.

* * *

[Page 437]

Q. Okay. Was the first one after the 1982 exam?

A. Yes, it was.

Q. Who was present at that interview?

A. Chief Gallant and Chief Laughlin.

Q. Would you tell us, please, in your own words what happened on that occasion?

A. He stated that he had no objections of me being a Lieutenant, that he though I would make a good Lieutenant, but under the circumstances that he would have to promote blacks according to the consent decree.

Q. Did he ask you any questions on that

[Page 438]

occasion about your past experience with the fire service?

A. No, he didn't.

Q. On any subsequent occasion during the pendency of the 1982 list, were you interviewed? During the '82 list?

A. During the '82 list?

Q. Were you ever called back?

A. No, sir.

Q. After the 1983 test, were you ever interviewed?

A. Yes, I was.

Q. On how many occasions?

A. On one.

Q. Okay. And what happened on — on that occasion?

A. It was basically like the first interview. He stated that he had no objections to myself being a Lieutenant, that he didn't know how — there was five openings at the time and

didn't know exactly how they was going to have to promote them.

Q. You were third on the list?

A. I was third on the list.

Q. And did he indicate how many whites

[Page 439]

or how many blacks he thought he was going to promote?

A. He said he didn't know whether he had to promote three and two or four and one, in which order he was expected to promote them.

Q. And ultimately he promoted three blacks and two whites?

A. Yes, sir.

Q. Did you ask him any questions about whether you could expect to be promoted off of that list?

A. On another occasion, we was at Station 1 for an insurance seminar, and I saw him in his coffee room there. And I just stuck my head in the door and I asked him that I understood that he had made the request for four more lieutenants, and he said, yes, but he didn't know if he was going to get them or not.

Q. Now, this was during the pendency of the 1983 register?

A. Yes, sir.

Q. And he indicated to you that he had requested four more lieutenants' positions to be filled?

A. That is correct.

[Page 440]

Q. Do you know if there were in fact vacancies at that time?

A. Yes, sir, there was.

* * *

[Page 440]

Q. Now, I believe you testified that you are ninth on the current register, the '80 — after the 1984 test?

A. I came out ninth on that list, yes, sir.

[Page 441]

Q. Okay. Have you been interviewed as a result of your position — your results on that examination?

A. No, I have not.

* * *

[Page 442]

Q. Mr. Wilks, as I understand it, you were number eight on the 1982 register?

A. Yes, sir.

Q. And there were — were there 12 promotions made during the pendency of that register?

A. Yes, sir, there was.

Q. Were you the highest ranking eligible who was not promoted from that list?

A. Yes, sir.

Q. And I — the 1983 test you were third

[Page 443]

on the register?

A. That is correct.

Q. And there were five slots filled during the promotion — during the pendency of that list?

A. Yes, sir.

Q. And again you were the highest person — the ranking eligible who was highest on the list who was not promoted?

A. That is correct.

Q. And during the 1984 list that is now in effect you are number nine. How many promotions have been made from that list?

A. Ten, I believe. I think it's eleven. Ten.

Q. Ten or eleven?

A. Ten.

Q. Okay. And you have not been interviewed as of this time?

A. No, sir.

Q. And also in 1980 — during the pendency of the '83 list, Chief Gallant told you that they had open positions?

A. Yes, sir.

Q. And those were not filled during the

* * *

[Page 444]

pendency of the list?

A. No, sir, they were not.

* * *

[Page 452]

Q. Are you a member of the Birmingham Association of Fire Fighters, Local 117?

A. Yes, I am.

* * *

[Page 462]

RONNIE J. CHAMBERS,

being first duly sworn, was examined and testified as follows:

* * *

[Page 463]

Q. When were you hired by the fire service?

A. February the 23rd, 1970.

Q. Is that an uninterrupted seniority date?

A. Yes, it is.

* * *

[Page 476]

CARLOS E. PAYNE,

being first duly sworn, was examined and testified as follows:

* * *

[Page 476]

Q. What is your present classification?

A. Lieutenant.

Q. When were you promoted to lieutenant?

A. August of '83.

Q. When did you begin working for the

* * *

[Page 477]

fire department?

A. June of 1960.

Q. Is that an uninterrupted seniority date?

A. Well, seniority, yes, sir — well, no, not exactly.

Q. Okay.

A. I quit in '66.

Q. About — for less than a year?

A. Yeah. It was back — be less than a year.

* * *

[Page 484]

Q. (BY MR. JOFFE:) How much time

[Page 485]

elapsed between when you were certified and thought you were going to be promoted and when you were actually promoted?

A. I think about a month.

Q. I'm sorry. Maybe you didn't understand the question. Between when you were certified after the first test.

A. '82 and '83?

Q. Yes. How much time —

* * *

[Page 485]

A. To my knowledge in '82 I wasn't certified.

Q. (BY MR. JOFFE:) When did you take the test?

A. In '82?

Q. Yes.

A. January, I think, sir.

Q. And when you were passed over the first time when you ranked number ten, that was in '82?

A. Yes, sir.

Q. And when you finally got your promotion in '83, how much time had elapsed?

[Page 486]

A. From the time I taken the second test or —

Q. No. From the time you — the first set of promotions were made until the time you were promoted.

A. Well, from — I don't know when the grades came out in '82, March, I think, probably from March of '82 until August of '83.

* * *

[Page 486]

WOODROW LAST[illegible]R,

being first duly sworn, was examined and testified as follows:

* * *

[Page 493]

Q. (BY MR. JOFFE:) For the record, would you state your race?

A. Black.

* * *

[Page 495]

Q. Did you ever apply to be a fire fighter in Birmingham in the 1960's before your military service?

A. No, sir.

Q. Why didn't you?

A. It wasn't the thing to do.

Q. Why was that?

A. Hostilities.

Q. Could you describe what hostility you are talking about?

[Page 496]

A. Prior treatment by the fire department during the 1960's, demonstrations.

Q. Of blacks?

A. Right.

* * *

[Page 529]

JAMES E. LASTER,

being first duly sworn, was examined and testified as follows:

* * *

[Page 530]

Q. What is your race for the record, please, sir?

A. I am black.

Q. And who is your current employer?

A. City of Birmingham.

Q. Are you employed by the fire service?

A. Yes, I am.

Q. When did you begin working for the Birmingham Fire and Rescue Service?

A. 1974.

Q. Was it January 21, 1974?

A. Yes, it was.

Q. Did you take the promotional examination for fire lieutenant in January of 1982?

A. Yes, I did.

* * *

[Page 550]

Q. Lieutenant, have you lived in Birmingham all of your life?

[Page 551]

A. Yes, I have.

Q. You lived in Birmingham during the 1960's?

A. Yes, I did.

Q. Lieutenant, did you apply for the Birmingham Fire Service during the 1960's?

A. No, I did not.

Q. Did you have any friends of yours who were black that applied to the Birmingham Fire Service in 1960?

A. Not to my knowledge, none.

* * *

[Page 551]

Q. Lieutenant, was it common knowledge among the black community in the 1960's that the City of Birmingham discouraged blacks from

[Page 552]

applying to the Birmingham Fire and Rescue Service?

A. Best of my knowledge, yes.

Q. And what is that based on?

A. Historical procedures.

* * *

[Page 553]

Q. And how long were you in the Marine Corps?

A. Three years.

Q. Did you receive an honorable discharge?

A. Yes, I did.

Q. And when were you discharged?

A. 1969.

* * *

[Page 603]

ROBERT BRUCE MILLSAP,

being first duly sworn, was examined and testified as follows:

* * *

[Page 604]

Q. When did you begin working for the fire and rescue service?

A. On December of 1976.

Q. Is that an uninterrupted seniority date?

A. Yes, it is.

* * *

[Page 619]

Q. (BY MR. ALEXANDER:) Mr. Millsap, you are a station steward at Station 25 with the BFA, is that correct?

A. That is correct.

* * *

[Page 620]

Q. There would have been times when you would have communicated with others of your colleagues in the union for purposes of verifying test scores on a particular exam?

A. Yes, just about all the fire department members are members of the union, yes.

* * *

[Page 631]

Q. Is there any reason why you would be ineligible or unable to sit for the exam when it's next given?

A. I could foresee no reason.

* * *

[Page 632]

Q. I think on your direct examination you said that just about all fire department members are members of the union, is that correct?

A. That would be correct, yes.

Q. Is that true of black members as well?

A. No, it is not.

Q. When was the 1980 —

A. When you talk — excuse me. Are you talking about all black members of the department?

Q. I wasn't talking about anything. I was asking whether when you made the statement just about all fire department members are m nbers of the union you were thinking only of whites or whether you were thinking of blacks and whites?

A. I was thinkin about all members of

[Page 633]

the department. Did you not ask if it was true of blacks, also?

Q. On direct examination, did you not say that just about all fire department members are members of the union?

A. Yes, I did.

Q. Is that true of blacks as well?

A. I wouldn't know if it's true of all blacks in the department.

* * *

[Page 633]

Q. Mr. Millsap, my question to you was whether when you made the statement just about all fire department members are members of the union that question or that answer — that

statement was true of all members of the fire department or just the whites?

A. All members of the fire department, yes.

Q. But it is not true of blacks, is it, that just about all the black members of the fire department are members of the union?

[Page 634]

A. I don't know. I don't know the answer to that.

Q. Well, if you don't know the answer to that, how could you make the statement with respect to just about all members of the fire department?

A. I've known — I know that at one time just about all members of the fire department were members of the Fire Fighters' Association. I know that in the past some blacks have gotten out of the organization. I don't know the exact number.

* * *

[Page 642]

JOHN E. GARVICH,

being first duly sworn, was examined and testified as follows:

* * *

[Page 643]

Q. And how long have you been employed with the fire department?

A. Since '70 — January 1974.

Q. And have you served continuously with the fire department since that date?

A. Yes, I have.

* * *

[Page 691]

JACK FREEMAN,

being first duly sworn, was examined and testified as follows:

* * *

[Page 691]

DIRECT EXAMINATION

* * *

[Page 695]

Q. Did there come a time when you were promoted to the position of fire lieutenant?

A. Yes, sir.

Q. What was that? Do you recall the date?

A. May the 27th, 1985, I was promoted to lieutenant and assigned to Station 13.

* * *

[Page 729]

JAMES W. HENSON,

being first duly sworn, was examined and testified as follows:

* * *

[Page 729]

Q. When did you begin working with the fire service?

[Page 730]

A. On October 20th, 1976.

Q. Is that an uninterrupted seniority date, sir?

A. Yes, sir.

* * *

[Page 837]

ALVIN BERNARD VON HAGEL,

being first duly sworn, was examined and testified as follows:

* * *

[Page 837]

Q. When did you begin working with the

[Page 838]

fire department?

A. February 12, 1968.

Q. Is that an uninterrupted seniority date?

A. Yes, sir, it is.

* * *

[Page 961]

CHARLES E. CARLIN,

being first duly sworn, was examined and testified as follows:

* * *

[Page 962]

Q. When did you begin working for the fire department?

A. January the 6th, 1964.

Q. Is that an uninterrupted seniority date?

A. That's correct.

* * *

[Page 982]

HOWARD POPE,

having been first duly sworn, was examined and testified as follows:

* * *

[Page 983]

Q. When did you begin working with the Fire and Rescue Service?

A. December 26th, 1958.

Q. Is that an uninterrupted seniority date?

A. Yes, it is.

* * *

[Page 994]

Q. . . . You stated that you were hired by the city in December of 1958?

A. That's correct.

Q. And prior to your being hired, did you take an examination administered by the Jefferson County Personnel Board?

A. Yes.

Q. And how many people approximately took that examination?

A. I am not certain. There were probably a hundred and fifty in the group that I took. And I understood they were giving a second test that afternoon. I am not sure.

Q. Were there any blacks tested at the time that you took the examination?

A. None that I can recall.

Q. Do you have any idea why there were no blacks taking that examination at that time?

A. No, I don't.

Q. You have in front of you a document marked for identification as Defendant's Exhibit Number 1984. That document purports to be an announcement for an examination for fire fighter. Have you ever seen that document before?

[Page 995]

A. No, I haven't.

Q. Did you see an examination — did you see an examination announcement at the time that you took a fire fighter test?

A. No.

Q. You don't recall seeing any piece of paper pertaining to the test at the time that you showed up to take the examination?

A. No.

MR. DEVANEY: Objection, Your Honor. It is beyond the scope.

THE COURT: Overruled.

Q. (BY MR. SPOTSWOOD:) I call your attention to the fact that under entrance requirements, there is stated applicants must be white male and meet the qualifications prescribed below. Did you ever see such a piece of paper at the time that you took the examination or prior to the time that you took the board examination for fire fighter which restricted the applicants to white males?

MR. FITZPATRICK: Your Honor, I am going to object to questioning him from the document. And I am not sure whether his question is has he ever seen this statement on

[Page 996]

the document or such a statement, but if he is questioning from the document, I am going to object.

THE COURT: Overruled.

A. Now, repeat your question.

Q. (BY MR. SPOTSWOOD:) My question is, did you, at the time that you took the fire fighter examination, see a piece of paper indicating that among the entrance requirements were that the applicants must be white males?

A. No. I did not.

Q. At the time that you were promoted to lieutenant, which I believe you said was January 1974, were there any black lieutenants —

A. No.

Q. — in the department?

* * *

[Page 998]

Q. (BY MR. JOFFE:) Captain, when you entered the Birmingham Fire Department, were you aware that blacks were not allowed to apply or could not take the test?

A. No. I was not.

Q. Are you aware of that now, today —

A. That is not the case today.

Q. No. Are you aware today that there was a time when blacks were not allowed to take the entrance test?

A. Yes. I have been told that, but at that time, I was not aware. I had never seen a

[Page 999]

form such as he showed me there.

* * *

[Page 1000]

MICHAEL MARTIN,

being first duly sworn, was examined and testified as follows:

* * *

[Page 1001]

Q. When did you begin with the Birmingham Fire Department?

A. August 15th, 1966.

Q. Is that an uninterrupted seniority date?

A. Yes.

* * *

[Page 1020]

Q. (BY MR. HAWLEY:) Captain, I am Greg Hawley with the City and the mayor. You said earlier that August 15th, 1966 was the date of your uninterrupted seniority with the department?

A. Yes.

Q. Were there any black employees in the department at that time?

A. No.

* * *

[Page 1024]

Q. When you were promoted to lieutenant in 1975, were there any black lieutenants on the Birmingham Fire Department?

A. No. There were not.

* * *

[Page 1031]

TONY GENE JACKSON,

being first duly sworn, was examined and testified as follows:

* * *

[Page 1032]

Q. (BY MR. FITZPATRICK:) What is your race, sir?

A. Black.

Q. Who is your current employer?

A. City of Birmingham.

Q. Are you employed in the fire service?

A. That's correct.

Q. What is your present classification?

A. My present classification is station captain.

Q. Did you begin working with the Birmingham Fire and Rescue Service on August the 1st, 1977?

A. That's correct.

Q. And did you apply for promotion to lieutenant in January of 1982 by taking the test?

A. That is — I believe that is correct.

Q. Were you promoted in April of '82 to lieutenant?

A. Correct.

* * *

[Page 1040]

Q. (BY MR. WHIPPLE:) Captain Jackson, were you among the first group of blacks to be promoted to the position of fire lieutenant in the Birmingham Fire and Rescue Service?

A. That's correct.

Q. Were you the first black promoted [to] the position of fire captain and are you now the only black serving as a fire captain in the Birmingham Fire and Rescue Service?

A. That's correct.

* * *

[Page 1042]

Q. Captain Jackson, when you graduated from high school, were you interested in becoming a fire fighter?

A. Yes, I was.

Q. Why didn't you apply to become a fire fighter?

A. Well, at the time of my graduation, I had heard through a friend who said that he had came down to the chief's office to ask about applying for the job as fire fighter, and during our conversation, he told me that the officer that he talked to told him that they weren't

[Page 1043]

hiring Negroes for that position in Birmingham.

* * *

[Page 1060]

BOBBY M. MCKEE,

being first duly sworn, was examined and testified as follows:

* * *

[Page 1060]

Q. (BY MR. DEVANEY:) Captain McKee, when did you begin working for the Birmingham Fire and Rescue Service?

A. June the 14th of 1953.

* * *

[Page 1063]

Q. (BY MR. JOFFE:) Are you aware that at the time you joined the Birmingham Fire Department blacks were precluded from applying for positions?

A. Yes, sir.

Q. Do you know when that situation changed?

A. No, sir, I couldn't give you the date.

* * *

[Page 1068]

Q. Captain McKee, do you know Captain Tony Jackson of the fire and rescue service?

A. Yes, sir.

Q. Can you state whether you ever worked with him personally?

A. Yes, sir.

Q. Where have you worked with him?

A. Station 20, Five Points West.

Q. When did you first work with him at Station 20?

A. September — it was in the first of September of 1980 when I was transferred to Pratt City over there I worked —

Q. What position — I'm sorry.

A. I went on the shift that Jackson was already at 20 on when I went over there.

Q. What position did he hold at that time?

A. Tony was on the snorkel, and I believe he was working assistant — assistant platform operator, I believe, was the position.

[Page 1069]

He wasn't assistant driver, and he wasn't driver, so I believe he was assistant platform operator.

Q. He wasn't an officer at that time?

A. No, sir.

Q. And what position did you hold at that time?

A. I was station Captain.

Q. Based on your — first of all, how long did you work with him when he was a fire fighter before he was promoted to Lieutenant?

A. Approximately a year and a half.

Q. Do you have an opinion of him as a fire fighter?

A. Yes, sir.

Q. What is your opinion?

A. Tony was a good fire fighter. Tony was interesting and everybody liked to work with him. He knew his job pretty well and everything. He did a good job, and he's willing to work. You tell him what you want did, and that's what — that's what Tony would do. He was a good fire fighter.

Q. Did you work with him when he was promoted — after he was promoted to Lieutenant?

A. Yes, sir.

[Page 1070]

Q. Again at Station 20?

A. Yes, sir.

Q. Were you on the same shift?

A. Yes, sir.

Q. Can you explain why you were on the same shift? To me that seems a little unusual that two officers would be on the same shift?

A. Well, what we call double company stations where you have a truck and a snorkel and an engine at the same station that's housed in the same building you have an officer assigned to each piece of the major equipment there. So that would make two Lieutenants on some shifts or a Captain and a Lieutenant on other shifts, and that's why Tony and I were working together.

Q. And if I haven't already asked you that, how long did you work with him when he was a Lieutenant?

A. Ten months.

Q. Do you have an opinion as to his ability as a Lieutenant.

A. Yes, sir, I have an opinion.

Q. Would you express that opinion?

A. Well, he wasn't — he wasn't —

[Page 1071]

wasn't a real good Lieutenant. He wasn't adequate. Tony had problems making decisions. He had problems comprehending fire textbooks that were printed on fire and medical type stuff.

Q. How do you know that?

A. Well, he made some judgments at fires that didn't — that the textbooks had covered and in studying for exams or just plain studying for proficiency in the job and some of these things were covered in these books.

* * *

[Page 1075]

Q. At the time that Mr. Jackson was promoted to the position of Lieutenant, did you feel that he was minimally qualified for the position?

A. No, sir. Tony had never had any experience riding the seat or working in an officer's capacity, making decisions, no, sir.

Q. At the time that he was promoted to the position of Captain, do you have an opinion as to whether he was minimally qualified for that position?

[Page 1076]

A. No, sir, he wasn't qualified for Lieutenant, and he hadn't made any progress toward that direction, no sir.

* * *

[Page 1087]

KENNETH WARE,

being first duly sworn, was examined and testified as follows:

* * *

[Page 1088]

Q. Are you presently employed, sir?

A. Yes, I am.

Q. And where are you employed?

A. I'm employed with the City of Birmingham Engineering Department.

Q. How long have you been employed in the engineering department?

A. Twenty-three years.

Q. What was your first date of employment?

A. January the 2nd, 1963.

Q. And have you been continuously

[Page 1089]

employed by the City engineering department since that date?

A. Yes, I have.

* * *

[Page 1123]

Q. Your employment began with the City in 1963?

A. Correct.

Q. Were there any blacks in the engineering department at the time you joined it?

A. None that I recall.

Q. You worked for three years as a rodman?

A. Correct.

Q. Did you work with any blacks at that

[Page 1124]

time?

A. No.

Q. Do you recall any blacks during that time?

A. Recall any blacks?

Q. Were there any blacks with the department during that time?

A. None that I recall.

Q. Who was the first black hired to a classified position with the engineering department?

A. I don't know.

Q. Do you recall testifying in your deposition that it was in the late 1960's?

A. I think that's correct.

Q. Do you know who that was?

A. I think that it might have been James Franklin.

Q. Who is the first black transitman with the engineering department?

A. I don't know.

Q. Was it Lucius Thomas?

A. It could have been.

Q. Who was the first black chief of party with the engineering department?

[Page 1125]

A. I don't know that either.

Q. Was it Lucius Thomas?

A. Could have been.

Q. Prior to Lucius Thomas' promotion, did the City of Birmingham employ any blacks in civil engineering?

A. No.

Q. Did any black hold a position with the engineering department higher than civil engineer?

A. I don't think so.

Q. Does any black today hold a position higher than the position of civil engineer with the engineering department?

A. I don't think they do.

* * *

[Page 1146]

JACK DUNLAP,

being first duly sworn, was examined and testified as follows:

* * *

[Page 1178]

Q. Did you ever see any job announcements when — at or about the time you came to work for the engineering department?

A. I'm sure I did.

Q. Can you describe generally what they looked like?

[Page 1179]

A. They were on paper. They announced the qualifications.

Q. Do you know whether any of the job announcements for any of the positions in the engineering department restricted applications to white employees?

A. I have an impression that they did, but I don't remember specifically.

MR. FITZPATRICK: Mr. Hoffinger, you just gave me the original.

MR. HOFFINGER: I'm sorry.

Q. (BY MR. HOFFINGER:) Mr. Dunlap, I just handed you Defendant's Exhibits for identification 1982, 1983, 1986, 1988, 1991.

Do these documents refresh your recollection about restrictions, racial restrictions in job announcements in positions with the City at or about the time you joined the engineering department?

MR. FITZPATRICK: I'm going to object, Your Honor, as to whether it refreshs [sic] his recollection until he can identify the document.

THE COURT: Well, I will overrule.

A. It doesn't refresh my memory any. It looks like a standard type document. This says

[Page 1180]

applicants must be white male, eighteen years of age, the one I'm looking at. But I don't remember, you know, that specifically.

Q. (BY MR. HOFFINGER:) Can you identify these documents?

A. They appear to be Personnel Board announcements of job positions.

Q. Do you know if you have ever seen any one of these documents before?

A. I'm sure I have because I read — if these are documents that were issued then, I read the ones that were applicable to me, and I would have read them.

MR. HOFFINGER: I would like to move the admission of these documents into evidence, Your Honor.

MS. MANN: Your Honor, objection. Some of these documents are dated prior to a time when this gentleman was in the engineering department.

MR. HOFFINGER: We can deal with them one at a time, Your Honor.

THE COURT: Well, insofar as Exhibits 1983 and 1982 being announcements dated in 1957, is there any objection to those?

[Page 1181]

MS. MANN: Just on relevancy grounds.

THE COURT: All right.

* * *

[Page 1181]

THE COURT: Well, in any event, they certainly appear to be authentic if you are familiar with the form, the way they look, and if necessary, under 91 (B) (4), I'm going to treat them as authenticated.

MR. WHITESIDE: All right.

THE COURT: Is there any objection?

[Page 1182]

MR. WHITESIDE: No objection. I understand they aren't even the City's documents. I apologize, Your Honor.

THE COURT: All right. Exhibits 1983 and 1982 are received. Exhibits 1986, 1991 and 1988 are rejected.

Do you have further examination?

MR. HOFFINGER: Yes, I do.

Q. (BY MR. HOFFINGER:) When were — when was the first black transitman employed by the engineering department?

A. Either the late '60's or early '70's, I would think.

Q. Do you know who that first black transitman would be?

A. I don't — I can remember three black transitmen, but when they were employed, I can't. And that was Frank Sammon, Lucius, Al Jackson. They were probably among the first

ones. I remember other ones, but those are the first ones I remember.

Q. When was the first black chief of party employed by the engineering department?

A. Either the mid or late 70's.

Q. Who was that employee?

[Page 1183]

A. I don't know remember whether Al Jackson or Lucius was the first employed, but they were employed near the same time.

Q. Was Lucius Thomas the first black civil engineer employed by the City?

A. Yes.

Q. Has there ever been an employee of the engineering department — strike that.

Has there ever been a black employee in the engineering department in a position higher than civil engineer?

A. Not to my knowledge.

* * *

[Page 1191]

CHARLES A. BROWNE,

being first duly sworn, was examined and testified as follows:

* * *

[Page 1218]

Q. When you first came with the department, I believe you said it was back in '59 or so?

A. Yeah. Late '58 or early '59.

Q. Were there any blacks in classified positions in the department at that time?

A. Not at that time.

Q. When was the first black hired in a classification position?

[Page 1219]

A. In '68.

Q. When was Mr. Thomas hired by the city?

A. Late '68 or early '69.

Q. So was Mr. Thomas one of the first blacks hired in a classified position in the engineering department?

A. If I'm not mistaken, he was the third.

* * *

[Page 1255]

MS. MANN: Your Honor, at this time, the plaintiffs rest.

THE COURT: All right. Is that both the United States and the private plaintiffs?

MR. FITZPATRICK: Yes, Your Honor.

THE COURT: All right.

MR. FITZPATRICK: I don't have the

[Page 1256]

summary exhibits like the United States. I don't have the word processing capabilities that they have.

THE COURT: All right. I assume the defendants wish to move under Rule 41.

MR. ALEXANDER: Yes, sir.

MR. WHITESIDE: Your Honor, we have a motion we would like to file.

MR. ALEXANDER: We have got some proposed findings as well.

THE COURT: How many words from your word processor?

MR. ALEXANDER: Forty-three, Your Honor. I hope that — we would be pleased to respond orally, but I think the findings set forth the factual contentions and we have briefed the matter extensively.

MR. JOFFE: We join in the motion, Your Honor.

THE COURT: The Court is going to grant the Personnel Board's motion for dismissal. I'm going to deny under the provisions of Rule 41 the other defendants' motion for dismissal subject to hearing additional evidence without prejudice to the presentation.

* * *

[Page 1258]

MR. ALEXANDER: If Your Honor, please, there's some documentary matters that we would like to address. We have offered the transcripts and exhibits from the 1976 and 1979

[Page 1259]

trials in the original United States versus Jefferson County case.

We offer those not for the truth of any matter asserted. We offer them simply as evidence of what was before the Court and the parties to the consent decree at the time it was entered. We have an index of that material which we have furnished to the plaintiffs.

MR. SPOTSWOOD: Your Honor, for the record, Exhibit Number 1977 is the transcript —

THE COURT: Say that again.

MR. SPOTSWOOD: Is 1977. That Exhibit Number is the transcript of the 1976 trial of United States versus Jefferson County.

THE COURT: Which was about what, about a day or a day and a half trial, something like that?

MR. ANGUS: Three days.

THE COURT: Three days?

MR. SPOTSWOOD: Yes, sir. Exhibit 1978 consists of the exhibits introduced into evidence at the 1976 trial. We have a listing of those exhibits.

THE COURT: All right. Exhibit 1978 would be the exhibits themselves, and this index

[Page 1260]

or listing of the exhibits would be —

MR. SPOTSWOOD: Your Honor, I give that for the convenience of the Court and the parties to get really through the record. I don't know if it —

THE COURT: We will call that 1978-A.

MR. SPOTSWOOD: 1979 is a transcript of the 1979 trial of United States versus Jefferson County. 1980 is the exhibits introduced into evidence at the 1979 trail, and we have a listing of the 1979 trial exhibits as well.

THE COURT: Which will be shown as 1980-A.

MR. SPOTSWOOD: We offer those exhibits at this time.

THE COURT: They will be received — go ahead.

MR. FITZPATRICK: For the record, Your Honor, Mr. Alexander correctly recognizes that they are hearsay and that they are not offered for the truth of any of the matters contained therein.

The plaintiffs were not parties to that case. The Court of appeals recognized that

[Page 1261]

in the prior appeal. As a matter of res judicata or collateral estoppel, we object to any use of the information contained therein that make findings of discrimination that may be applicable to this litigation or against the plaintiffs.

As far as what findings this Court made in prior proceedings, we also object to being bound by those findings. I think this is overkill in terms of volume of material which is of marginal value. The Court can certainly take notice of its 1979 — 1977 order and its 1981 order as well.

But as far as all this other information, there's just so much there as to make it of little usefulness. I recall when that case was appealed, after the intervention proceedings, the Court found it so voluminous that it suggested that this entire record not even be sent to Atlanta. That is enough.

MS. MANN: Your Honor — on behalf of the United States, we would object to exhibits 1977 and 1978 and 1978-A on relevancy grounds. The first trial concerned entry level positions that had nothing to do with the promotional

[Page 1262]

process and we would object to those on relevancy grounds.

With respect to exhibits 1979, 1980 and 1980-A which concern the '79 trial, as Your Honor is aware, the United States is not challenging the validity of the decree. We think that the plaintiffs are limited in their ability to challenge the validity.

We think that the Court in United States versus Jefferson County instructed that the plaintiffs should not attempt to reopen or relitigate the earlier proceedings. We would also join the plaintiffs in their objections just on grounds of volume.

MR. FITZPATRICK: Your Honor, one final point, if I may. In the consent — in the City decree and I believe also in the Personnel Board decree, the decree parties waived findings of fact — further findings of fact and further conclusions of law, and they gave up their right to seek any further findings from this Court that they — I am not sure that they are seeking at this time or not.

THE COURT: Well, the ruling is as follows: That as against the private plaintiffs

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in this litigation, these several exhibits, '77 through — 1977 through 1980-A, these will be received for the limited purpose of showing the type of evidence that was presented to the Court as a foundation for first its rulings on the impact and validity of certain entry level tests and the impact and validity of certain additional tests and other screening devices in the 1979 trial.

Insofar as these matters ever being matters that would be submitted to a court of appeals, my assumption is that any court of appeals would do as the earlier one did and namely, not actually want the exhibits themselves ever presented but they are shown as received as against the private plaintiffs for the limited purpose of offer.

As against the United States, they actually could be received for a stronger purpose, at least as to statements made by the United States attorneys during the trial of that case.

However, that would require sifting through to see what the statements were that were made by the United States attorneys in that

[Page 1264]

case, and I take it that the defense in limiting their offer are relieving me from this obligation.

MR. ALEXANDER: We reserve our right to sift through at later proceedings if required, but not at this time.

THE COURT: Well, I will just tell you I do not anticipate sifting through —

MR. ALEXANDER: No, sir.

THE COURT: —to look for any matters that might be admissible as against the United States for that purpose, bearing in mind that we have private plaintiffs here against whom that couldn't be used for that purpose. So I think it would be of little utility for that reason.

To the extent the United States and I suppose the private plaintiffs are saying that the earlier proceedings related to entry level jobs, it is my view that that does in no way indicate that

that is irrelevant to the question of promotions, at least not promotions in the same department.

In my view, if you limit somebody's right to become a fireman, you limit their right

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to become a fire lieutenant and a fire captain and I don't think there's any way you can go around that, but that is my view in overruling that objection.

MR. ALEXANDER: Your Honor, the other matters are documentary at this time. They deal with a number of the records of the City and otherwise we assume there will be no authenticity objection and if there is, Mr. Graham is available and we can do it formally.

MR. SPOTSWOOD: Your Honor, the first item — excuse me, the first item is Defendant's Exhibit 1431 and consists of the transcript of the fairness hearing and the exhibits thereto in United States versus Jefferson County.

MR. FITZPATRICK: Your Honor, may I inquire as to the extent of the other exhibits? I thought everything from U.S. versus Jefferson County was already in front of the Court.

THE COURT: No. Up to this point we have just dealt with the '76 and '79 trials.

MR. FITZPATRICK: So anything that happened in between those trials or after those trials are not before the Court, I take it?

THE COURT: Not at this point, as I

[Page 1266]

understand it, unless there has been some offer made previously. Maybe some of the items that were introduced at the outset of this trial may have been identified, but I know the consent decree itself certainly was.

MR. FITZPATRICK: May I inquire of counsel as to whether the docket sheets from the earlier proceedings are in the earlier exhibits that you offered?

MR. ALEXANDER: I don't know, but we did furnish the index, that I know.

MR. FITZPATRICK: And how about the pleading files from those earlier?

MR. ALEXANDER: I assume that is the complete set of records.

MR. FITZPATRICK: The pleading files are in there?

MR. ALEXANDER: That is my assumption. It is in the index if it is not.

MR. SPOTSWOOD: I think I can answer that question. These were the exhibits that were actually introduced into evidence at the trial and the transcript of the trial itself. Defendant's Exhibit Number 1431 is the transcript of the fairness hearing with the

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exhibits that were introduced into evidence at the fairness hearing.

There is one exhibit, Exhibit 4, I believe, that the clerk could not locate which is not included in these — in this exhibit.

THE COURT: All right. And I take it —

MR. FITZPATRICK: Same objections as earlier, Your Honor.

THE COURT: Here again, it is being offered for the same kind of purpose as I understand it. Be received on the same limited basis.

* * *

[Page 1284]

THE COURT: Was Exhibit 2177 introduced by the intervenor defendants limited to those requests that related to matters of historical discrimination?

MR. JOFFE: Essentially, yes, Your Honor.

THE COURT: I understand the distinction.

* * *

[Page 1305]

MR. FITZPATRICK: Your Honor, I don't

[Page 1306]

believe it is in evidence, but the '77 memorandum opinion of this Court — to your knowledge, is it?

MR. ALEXANDER: To my knowledge, it is not.

MR. FITZPATRICK: I tender that only in response to the other orders that they submitted from '77.

MR. ALEXANDER: We have no objection.

THE COURT: The —

MR. FITZPATRICK: Particularly point out the portion which the Court found no intentional discrimination.

THE COURT: Now, there was I believe tendered as Exhibit 1422 the opinion in Seibels versus Ensley dated January 10, '77. Is that — is that different from what you are referring to?

MR. FITZPATRICK: Your Honor, they submitted your order of January 10, '77 but they did not submit your memorandum opinion upon which that order was based.

THE COURT: That may be so. I haven't yet found it in here. Let's see.

MR. SPOTSWOOD: Your Honor, that is correct. We did not submit the memorandum of

[Page 1307]

opinion and I believe it would be appropriate to include that.

THE COURT: All right. Why don't we just show that as an attachment to or as a part of Exhibit 1422 which was the — which would go with the order.

MR. FITZPATRICK: I was particularly concerned about calling to the Court's attention the finding of no intentional discrimination.

* * *

[Page 1312]

THE COURT: All right. Plaintiffs ready to proceed? Do you wish to divide your time in any way?

MR. FITZPATRICK: We have not set a certain number of minutes. I really don't believe that we are going to use the entire thirty minutes.

Your Honor, we believe we've

[Page 1313]

established beyond doubt that race was a controlling factor in each of the contested promotional decisions. I doubt that the defendants could seriously contest that, although they have denied the request for admissions.

At any rate, the use of race in the promotional process here has not been debated. It's clear from Gallant's deposition that he has gone white, black, white, black, right down the line. The City has not claimed, aside from proving that the black promotees are not demonstrably less qualified, we believe and will reassert one last time for the record, that once we've established the use of the unconstitutional factor of race in the promotional process, that the burden should then shift to the City, to the employer, as any other employer, to justify its actions. And if it wishes to justify the action by consent decree, by a valid affirmative action plan, or whatever, it can come into court and do so. They have failed to do so, in our opinion. We believe the evidence clearly demonstrates that.

In 1977, this Court found that the

[Page 1314]

Board violated Title 7 in using the entry level fire fighter exam, commencing in April of 1976. The Court's finding as to the date on which liability commenced I believe was vacated by the Court of Appeals. To my knowledge and from my reading of the various subsequent opinions, this Court never made a finding of when the date of liability should have commenced, at least after the Court of Appeals reversed in that narrow area.

This Court made an expressed finding in 1977 that the Board and the other defendants — I'll strike that. I don't want to misrepresent anything.

The Board had not engaged in a 14th Amendment violation in the use of the fire fighter entry level exam. This Court has never made a finding that any of the defendants, including Birmingham, has engaged in a 14th Amendment violation. To the extent we brought a 14th Amendment claim before this Court, there are no prior findings of discrimination in order to be raised in supporting the use of affirmative action in that context.

Moreover, many of the promotees at

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issue in this litigation were hired prior to the commencement of the — the violation which this Court found in the '77 order. If the April '76 date stands, each of the black promotees was asked the date he commenced working for the City, and many of them commenced work prior to that date I believe the evidence also shows that some were after that date.

None of the promotees has in any respect been shown to be an individual victim of discrimination, and the answers to interrogatories of the City which we proffered as evidence during to [sic] your case in chief demonstrates that the City has not gone about trying to identify these black promotees as individual victims. To the extent Stotts applies to promotions and the Court does not have the power to order relief for nonvictims of discrimination, we believe the consent decree as any other order is subject to that limitation under Title 7 and under

the Stotts theories, and I'm not going to debate the Stotts at this time. But under 706G the Court did not have power to order relief for nonvictims.

Finally, Your Honor, with respect to

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the '76 order, if promotional quotas were appropriate, we believe that the Court would have ordered a promotional quota or a promotional goal or any kind of preference at the promotional level in 1977. As it is, this Court ordered, as I understand it, referral goals to the Personnel Board. The Board then referred a certain number of black promotees — black individuals to the City, and the City did not even have an entry level goal.

With respect to additional findings of discrimination beyond those contained in the Court's '77 order, we believe the City as a matter of law is not a competent entity to make findings of discrimination, and many of these points are things that we've raised in briefs over the past two or three years, and I'm not going to try to burden the Court with a recitation of all of these matters.

Nor do we believe has the City claimed to make any findings of past discrimination separate and apart from whatever may be in this Court's record.

Last year Justices Burger, Renquist [sic] and Wright — and White, excuse me, dissented

[Page 1317]

from the denial of certiorari in Bush's which has been cited in our pretrial brief. Burger, White and Renquist [sic] found that affirmative action plans should be carefully policed. We believe this Court is being given an opportunity to engage in the careful policing of affirmative action plans here. While this Court approved the decree itself between the parties to that decree, it has never found that the decree has been properly or validly implemented as against the plaintiffs who are before the Court today.

Your Honor, there's a human factor here. There are people behind goals and quotas. Restoring an individual victim to his rightful place is one thing, and on behalf of the plaintiffs we are in favor of restoring individual victims to their rightful place. None of the promotees we believe is an individual victim or at least has not been proven to be, and the City has not found them to be. Pushing ahead less qualified individuals purely on the basis of race is another thing. When one person gets pushed ahead, another one gets pushed aside. The plaintiffs are the human beings that are being pushed aside. And we

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believe that the City has been far too aggressive in pushing aside some employees for the benefit of the others.

Here they are trying to draw a fifty percent quota out of a ten percent pool, and that is in our opinion a — creating a far greater adverse impact on the white employers trying to compete in this system. I don't know if I stated that very well, but the opportunity of getting to the system has a far greater effect on whites than it does on blacks. A black who signs up for the test, makes a minimum score at least according to Personnel Board standards of scoring, has — has an enormous opportunity to make it to the Lieutenants level and beyond at this point in time based on the City's current practices.

In Dade — in the Dade County case, the 11th Circuit held that the use of race in a conclusory fashion is improper even in the context of affirmative action. Here Gallant's deposition demonstrates again they are using race in a conclusory fashion.

It's apparent to us all that we've — we don't have clear guidance from the appellant

[Page 1319]

courts on these matters. The split decisions in *Bakke*, the ambiguous decision in [*Fullilove*] and subsequent decisions has — has left us all in a state of flux, and hence we've been warring with each other now for three or four years because of the lack of guidance. Maybe we'll have some guidance this term.

One thing that's clear though at least from Powell's decision in *Bakke* is that race should not be the be-all and end-all in trying to remedy past discrimination if you made appropriate findings. I think *Bakke* finds — Powell's decision in *Bakke*, and I'm not necessarily saying this is right, but at least if one looks at Powell's decision in *Bakke*, race in appropriate situations can be a factor to look at in conjunction with all of the other qualifications.

And taking everybody's qualifications — taking one group's qualifications and comparing them to another and then perhaps taking race into account in that fashion, at least according to Powell, may be appropriate. That's why he recognized the Harvard program as being one — approving the Harvard program while

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finding that at the University of California to be improper where there was a clear set-aside. Here we've got a clear set-aside. Birmingham has set aside a certain number of seats or certain number of Fire Lieutenant positions for blacks only. That's clear from Gallant's deposition again, and really the issue has been framed quite well.

The City has not claimed that we compared all the qualifications and came up with a decision that none of the blacks were demonstrably less qualified. In essence, they said we didn't compare. We just took them right down the line the way they came. So in that — in that — in that view, the issue has been well framed.

The defendants have failed to assert or prove that the decree required or mandated each of the subject promotions. We've demonstrated that each of these individual promotions were not expressly required by the terms of the decree by the differences in qualifications in which we believe we demonstrated using job-related criteria. Ms. Mann will discuss those further.

[Page 1321]

In going beyond the terms of the decree the defendants have shown that more was at work here in the system than a carefully tailored affirmative action plan where all of the factors are looked at in carefully determining whether or not in this given promotional decision a black should receive preference. Here it's been just a wholesale use of race, and we don't believe any of the courts of appeals or the Supreme Court have approved that kind of blatant use of race in this type of situation.

This Court recognized in May 1984, in denying the motions to dismiss, that the law has changed since the consent decree was approved by the Court. Here the City was — the Court framed the issue as to whether or not the subject promotions were in fact required or mandated by the decree, and the Court made reference to paragraph two. Since the day Your Honor approved the decree, paragraph two was recognized as a limitation on the goals and quotas in the decree, at least that's our reading of the 1981 opinion in response to the objections which — which I came before Your

[Page 1322]

Honor with.

Here the actors, the people controlling the decisions, are more than Chief Gallant and Chief Laughlin. The actors are the Mayor and the personnel director. They prescribe the affirmative action plan. They developed the prototype plan, sent it out to the various departments. If one word in that affirmative action plan varied, they'd kick it back to them and make them follow the prototype plan.

The prototype plan goes far beyond the terms of the decree. At least far beyond the requirements of the decree. To the extent Gallant and Laughlin believed they were complying with those plans, which we don't believe in any respect are valid, they weren't relying on the decree because the plans go far beyond the terms of the decree.

In closing, Your Honor, we've tried to present to you a clean, quick trial in accord with the instructions you gave us. We've identified some objective criteria that we believe is job-

related. We've shown clear differences, obvious differences. We've shown

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that race has been used in a conclusory fashion in the process, and we believe that many, if not all, of these plaintiffs have been the subject of unlawful discrimination. Thank you for your time this week.

MS. MANN: Your Honor, the United States has repeatedly indicated we are not challenging the validity of the decree. We are, however, challenging the City's improper implementation of the decree, the illegal pattern and practice of their implementation. As Mr. Fitzpatrick indicated, we very much disagree with the burden of proof that the Court has imposed upon the plaintiffs. We think it's a burden that no other court has imposed upon Title 7 plaintiffs. However, we believe we've met that burden.

At this point, we believe that we have demonstrated that certain white promotional candidates were demonstrably better qualified than certain black promotees Indeed, Your Honor, we believe that we have shown that certain black promotees were even unqualified. Your Honor, you've had an opportunity to look at the charts that we've used in this case, and

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what we have done is after countless depositions and voluminous discovery, we have taken what we believe to be job-related selection criteria, and we have used those criteria to show that any reasonable person could see that there is a clear and obvious difference between the promotional candidates.

We've established the job-relatedness of these criteria through the testimony of the Battalion Chiefs, the Fire Captains, and we've established that each of these criteria are important considerations in determining the qualifications of an individual for promotion.

With respect to tests, Your Honor, you have presumed the validity of the tests for purposes of this trial, and, therefore, their predictability of job performance. The analysis that we've

done is very similar to a hypothetical question that the city attorneys posed to Chief Gallant during his deposition asking him whether or not —

THE COURT: On A and B?

MS. MANN: That's right. And it's very similar, and Chief Gallant admitted that he

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thought that candidate A was better qualified than candidate B. However, when the consent decree and race were shown into the equation, Chief Gallant changed his opinion as to the person that he would — that he would choose to promote. We don't believe that the consent decree required him to make th promotion of the less qualified, the demonstrably less qualified individual.

Your Honor, for example, and I've just chosen one of our charts, the City's implementation of the decree has resulted, for example, in the promotion of an individual with a statistically significant — a significantly statistically less test score with three years experience. His highest position was plugman, the lowest position on an engine company. He had never served as a lead worker. He had never served as an acting officer. He had no education in fire science. He had no other fire fighting experience.

This person has been promoted over an individual who had seventeen years in the fire department He had served as a lead worker for a hundred and three months. He was certified

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for driver. He had served as an acting officer. This is the position that he was seeking to be promoted to over two hundred and fifty times. He had a degree in fire science.

The City has completely closed their eyes and ears to these qualifications and what Chief Gallant has done is he said I've got a white list, and I've got a black list, and I'm going to go straight down the list. If I'm supposed to promote a black this

time, then, I'm going to take the highest ranking black, and I'm not even going to consider or compare the other individuals.

THE COURT: Let me stop you at that point. Didn't Chief Gallant also say that if you had the same factor white or black with the one exception that the ranking on the test was such that the person with only three years of experience ended up being ranked higher he would with or without the consent decree have promoted that person?

MS. MANN: Your Honor, I'm not sure that I'm following your question.

THE COURT: My understanding of Chief Gallant's testimony is if you take the

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difference in characteristics that you've referred to but modify in effect one item, namely the test score, to the point that then the black — or wouldn't even have to be a black, was actually — who had only the three years of experience, no lead worker training, no drivers certificate, no AAS, et cetera, straight down the line, but if you make that one change, he would have appointed even before 1981 the person with only the three years of experience who had never served as a lead worker, et cetera?

MS. MANN: Your Honor, I think that is his testimony, and I think at that point the United States probably would not be involved in this case. I mean assuming that promotions weren't being made on the basis of race. It might be that the individual who had been — who we believe to be demonstrably better qualified would have a claim under state law in that his qualifications had not been considered and he wasn't promoted on the basis of merit and ability. The United States, though, would not be involved in this case if a less qualified white had been promoted instead of a better qualified white.

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But the fact of the matter is, Your Honor, that once the City undertook to use race as a significant factor in its promotional decisions, we believe at that time there was a corresponding obligation for the City to look at the qualifications of the

people that they were promoting. Chief Gallant said, well, I did things the same way after the decree as I did before, but, Your Honor, there was a difference. Previously Chief Gallant was — was taking the top ranking people off of a single certification, and he knew that these people were certified to him in rank order. After the decree, we have a situation where Chief Gallant is promoting someone who ranked a hundred and seventh, who barely passed the promotional exam over someone who was ranked number three, again without regard to all the rest of his qualifications. And the only other thing that he is throwing into that equation is the race of the individual. We believe that the minute race is thrown into the equations that there was an obligation on the part of the City to look at qualifications.

As Mr. Fitzpatrick indicated, when Your Honor approved the consent decree back in

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1981 Your Honor specifically noted that the goals of the consent decree were made subject to the caveat that the decree was not to be interpreted as requiring the hiring or promotion of demonstrably less qualified persons, and it was because of paragraph two, and the City made assurances that the decree would not result in their abrogating their responsibilities to insure that qualified individuals were promoted, and indeed at one point the City indicated that — that less qualified individuals would not be promoted. Your Honor —

THE COURT: You are referring now to the brief that was filed in one of the —

MS. MANN: Yes, Your Honor.

THE COURT: All right.

MS. MANN: Instead what has happened is there has been — in the case of the fire department, a total disregard for qualifications. In the engineering department, there's been a knowing disregard for qualifications, and solely on the basis of, we believe, an improper interpretation of the goals of the

decree. The decree very clearly provides goals. It does not provide for quotas and there is an abundance of

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evidence in this case to indicate that the — that these goals were being implemented as strict racial quotas.

At one point Chief Gallant said, well, this year I'm going to have to promote two blacks for every white. Your Honor, that is a quota. That is not a goal. It's not a goal that's subject to the availability of qualified applicants, and it's not a goal that is subject to a caveat that nothing shall require the promotion of a less qualified person over a demonstrably better qualified person.

Finally, Your Honor, to the extent that the City seeks to justify its conduct by saying it was mandated by the decree, we feel that the language in the decree is absolutely clear that to the extent a demonstrably less qualified person was promoted this conduct was not mandated, and the City cannot justify its conduct by simply articulating or invoking the decree as a defense to every single employment decision that was made.

To the extent that the City attempts to justify its conduct as remedying past discrimination, there's absolutely no evidence

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that any of these individuals were victims of discrimination, and certainly the way the City has implemented the decree has resulted in a unnecessary trammeling of the interests of these promotional candidates. They were incumbent employees. They spent years studying for these exams. They worked hard. They had fifteen, twenty years seniority, and what they were working for was this promotion, and the City's implementation of the decree has unnecessarily and improperly trammeled their expectations. And I am through.

MR. ALEXANDER: In 1981, Your Honor, the City of Birmingham settled interminable litigation. In exchange it has received interminable litigation. The City enjoys what I suspect is a unique distinction of defending pattern and practice

discrimination claims brought by the United States in favor of whites, blacks and women. Those facts seem to me to illustrate the extraordinary frustration that the City has enjoyed as a result of simply trying to settle a very difficult lawsuit, and by that I mean the original race discrimination case brought against the City, race and sex.

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The City of Birmingham has not enjoyed a good reputation in racial matters. That's not for me to dwell on today. What is for me to dwell on today is that in 1981 when we executed this decree with the private plaintiffs and with the United States, there were no Fire Lieutenants in our fire service, few blacks in our fire department. They have been excluded by custom and by a point in time the Personnel Board ruled. To correct the effects of those problems, we took into account in our decree race. Our decree does contain race and gender preferences. We acknowledged those preferences at the time of the fairness hearing, as did the Court.

The decree overlaps a very strong civil service system. I think the evidence — and basically what I want to do in these short minutes is simply comment on the evidence — demonstrates that there is a strong civil service system and that the City's limits — the City's options with respect to the employees are limited.

It is quite correct that Chief Gallant in the fire department took individuals

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certified for promotion in their rank order. At one time there was a rule of one, after the rule of three was adopted, as the Chief's deposition makes clear, his testimony in this case. That continued to be the case.

The Birmingham consent decree changes that process only in one respect. We now have a supplemental certification that includes black names. We do select those individuals to the extent we can do so on an alternating basis, although it is very

clear from the evidence that there have been periods of time when the City has not had black candidates.

The civil service system suggests and the City is entitled to rely upon that individuals certified to it are qualified. We have done so. Indeed, the only individual, as far as I am aware, in recent history in the fire department who has been rejected was a black individual certified pursuant to the decree for the position of fire lieutenant. I think that confirms the fact that Chief Gallant makes a cut of a sort to make certain that the City does not have unqualified or otherwise deficient individuals in its service.

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The United States, and I suppose the private plaintiffs in lock step, come before this Court with the suggestion that a number of whites are better qualified or demonstrably better qualified. They elect and select to prove their point racially neutral criteria that any reasonable person, I believe the argument goes, would clearly dictate that one individual was demonstrably better qualified than the other. The criteria are transparent. They are — the objective criteria, as they say, are transparent. They are largely contingent upon length of service.

The ranking process is affected by length of service. Individuals are entitled to twenty seniority points, if they have earned them, up to twenty. And Your Honor has the date by which the Court can assess that impact. The length of service is of course just that, length of service. Length of service in a department which did not have a black fire fighter until 1968.

Lead workers certainly strikes me as a reasonable criterion that in an abstract world would make some sense to consider. The

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difficulty is, in the real world there is one black individual who serves as the lead worker in the Birmingham Fire Department. The evidence overwhelmingly suggests that those positions are

allocated on the basis of station seniority or departmental seniority.

In either instance, the past effects of discrimination seem to me to be apparent. EMT-III elected at a point in time, 1972, when at best their would have been one black person eligible to enter into the program, looking at the results of the program now, I believe there is only one black EMT, and that individual is now certified as a fire lieutenant.

Acting officer, again contingent upon lead worker, again contingent upon seniority. Prior experience, I certainly don't suggest that that would have any continuing racial overtones, but I wonder how I would ever be able to advise the fire chief to assess it. I also think that the fire science degree criterion is probably racially neutral. But everything else fits into a perpetuation or perpetuation of a problem that the decree was designed to remedy.

It just seems to me that that is an

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extraordinarily cynical argument to make to the Court, that the supposedly neutral criteria somehow would be the bench mark that we ought to look at.

If we were to adopt these criteria, it would be a very long time before any other black received the promotion to the position of fire lieutenant. The objective, at least in part, of the 1981 consent decree.

We are not unmindful of the rights of whites. The Court undertook to consider those rights, and specifically the Valentine case, when it approved this decree.

It seems to me that the evidence of trammelling is remote. Many of the individuals who are named plaintiffs in this action that had their promotions delayed by a matter of months. Other individuals have had longer delays and even individuals who have, as the expression goes, died on the list, had a continuing opportunity to compete again, the situation again not different from that which had existed prior to the decree.

We are in a very curious situation in the construction of the decree. One of two

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things seems to me to be the end result of the United States' goals in this case. Either we adopt a set of criteria which effectively dismantle the decree, effectively saying yes, we have race-conscious relief, but within this narrow band such that effectively no one can compete, or we end up with the rather hideous prospect for all concerned of being either rather routine and regular litigants in this court. Neither result is desirable, neither result is intended.

We certainly hope that the consent decree that was adopted and approved in 1981 can be permitted to continue on the course that we all set out.

MR. JOFFE: While perhaps not in the excruciating detail as we have heard over the past five days, everthing that we have heard in broad brush, except possibly the voice of the United States, was contemplated when this decree was signed in 1981.

There had been a finding of discrimination in the first trial. More evidence had been presented in the second trial, including evidence of intentional discrimination.

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The United States had argued that experience was not a proper criteria to be used in this context. Negotiations took place. Consent decree was signed. It clearly provided for preferential treatment for blacks and women. No one in this courtroom in August of 1981 had any doubt of that.

Affirmative action was not left up to subjective criteria or seniority-based standards. The City was not to be allowed to so easily wiggle out of its obligations. The intervenors led by Mr. Fitzpatrick raised the objection that white males would be disadvantaged by the decree.

The Court, speaking to Mr. Alexander, said suppose the Personnel Board responds and gives you the names of two blacks and two whites. Suppose the City finds that the two

whites who were certified are demonstrably better qualified than the two blacks who are certified, what is your view in terms of what the City can do under this decree?

Mr. Alexander answered: Assuming that both the whites and the blacks were both qualified but assuming by some standard, and it's a little bit difficult for me to put it in

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a factual context, but some standard the whites were perceived to be better, if the blacks were perceived minimally qualified and we required additional blacks to meet our goals, then we would take them.

The Court recognized in its August '81 opinion that the decree would affect many employment practices and jobs. The Court considered the arguments against the decree. It measured the decree against the standards set down by the Supreme Court in [*Weber*] and found the provisions of the decree well within the limits upheld as permissible in these decisions.

It found that the hiring and promotion of whites was not unduly precluded. Its review indicated that it understood what was going to happen. The City has acted as it was expected to act. But for the confusion engendered by the Eleventh Circuit's language in December of 1983, I have and I hope it's not too presumptuous to say, the belief that these cases would have been dismissed a long time ago.

I think the Court recognized in its decision of this past February that the Eleventh Circuit's decision in Palmer made clear that the

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mandate language in the December 1983 opinion of the Eleventh Circuit would not bear the weight the plaintiffs would put on it. In any event, we have addressed that issue in our papers. And until this Court addresses it, nothing new can be said.

Let me turn [to] two passages in the Court's opinion of February 19th that I consider to be key. The Court said any at-

tempt to assess the relative qualifications of two individuals on the basis of their test scores is a risky process and in a minimum requires knowledge of the magnitude of the difference in their scores, if not also the significance of that difference given the characteristics of the measuring device.

The need for such information under paragraph two of the consent decree is highlighted by the language of that paragraph relieving the City from its minority employment goals only if such minority applicants are demonstrably less qualified.

The Court went on to say it may be, although this appears very doubtful, that the City officials making or recommending promotions

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did on some occasions have sufficient reliable information about these test scores and about the significance of the differences in these scores to have been justified in not promoting minority applicants. We have now listened. We have heard the evidence. And on not one occasion did the City have that information.

I cannot close without reemphasizing a point we have made all along. We would not be here today in the way we are without the intervention of the United States Government. Without in any way disparaging the efforts of Mr. Fitzpatrick and Mr. Jordan for their clients, it is [the] United States which has made this litigation viable, it has given it the patina of respectability. It has made the City, the blacks and even the whites go through a litigation process that should not have taken place.

We are here today because the United States has broken its word, it has gone back on its promises, and it has sought to rewrite history. Not just the blacks but the entire City of Birmingham, white and black, have been betrayed by their [sovereign], that should not have

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happened.

* * *

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA
Room 320 Courthouse, Birmingham
Announces an Open Examination For

ENGINEERING AIDE II, (Tracer)

TIME: 9:00 A. M., Thursday, February 7, 1957.

Each applicant is required to bring a ruler, ruling and lettering pens, and drawing ink to use in the examination.

PLACE: Room 518 Courthouse, Birmingham, Alabama.

SALARY: City of Birmingham: Beginning $258.00, maximum $314.00 per month; 6% deduction for retirement pension and 7% deduction for Federal Social Security.

Jefferson County: Beginning $261.45, maximum $315.00 per month; 7% deduction for Federal Social Security.

APPLICATIONS AND FINAL FILING DATE: Applications may be obtained at the office of the Personnel Board, Room 320 Courthouse, Birmingham, until 4:00 P.M., Tuesday, February 5, 1957.

Applicants applying after February 5, 1957, will be notified when to appear for examination.

PURPOSE OF EXAMINATION: To establish eligible registers from which to fill vacancies in the services of Jefferson County and the City of Birmingham.

ENTRANCE REQUIREMENTS: Applicants must be white, male, 18 years of age, and must not have passed their 35th birthday on the date of appointment, and must meet the qualifications prescribed below.

The residence of applicants is not restricted, but applicants placed on the eligible registers who live in the jurisdiction to be served will be certified first.

REQUIRED KNOWLEDGES, ABILITIES AND TRAINING: Graduation from a standard high school, or equivalent; general knowledge of engineering office practices and engineering subjects; ability to use engineering drawing instruments and to do neat lettering; ability to trace maps, profiles, and various engineering drawings neatly and accurately; ability to make minor detail drawings to scale from sketches and measurements; good knowledge of spelling and ability to solve arithmetic problems of average difficulty; precision; neatness; accuracy; reliability; good judgment; good physical condition and good moral character.

DUTY: Under supervision to trace in ink maps, profiles and various drawings prepared in pencil by Draftsmen and Engineers; make minor detail drawings to scale from sketches and measurements; color maps, prints or photostats with ink or water colors; do related work as assigned.

EXAMINATION SUBJECTS AND WEIGHTS:

Written Test (minimum grade required, 70%)	80%
Training and Experience	20%
Total	100%

MEDICAL EXAMINATION: Eligibles will be required to pass a medical and physical examination upon being selected for appointment.

FINGERPRINTS: All applicants will be fingerprinted at the time of obtaining applications.

Examination No. 5741
Announced November 13, 1956
Reissued January 11, 1957

CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
DEFENDANT'S EXHIBIT NUMBER 1982

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA
Room 320 Courthouse, Birmingham
Announces an Open Examination for

ENGINEERING AIDE III (RODMAN)

TIME: 3:00 P.M., Tuesday, January 15, 1957.

PLACE: Room 518 Courthouse, Birmingham, Alabama.

SALARY: Jefferson County: Beginning $238.35, maximum $286.65 per month; 2 1/4% deduction for Federal Social Security.

City of Birmingham: Beginning $234, maximum $285 per month; 6% deduction for retirement pension and Federal Social Security.

APPLICATIONS AND FINAL FILING DATE: Applications may be obtained at the office of the Personnel Board, Room 320 Courthouse, Birmingham, until 4:00 P.M., Thursday, January 10, 1957, upon payment of $1.50 application fee.

Applicants applying after January 10, 1957, will be notified when to appear for the next examination.

PURPOSE OF EXAMINATION: To establish eligible registers from which to fill present and future vacancies in the Engineering Departments of Jefferson County and the City of Birmingham.

ENTRANCE REQUIREMENTS: Applicants must be white, male, 18 years of age, and must not have passed their 35th birthday on the date of appointment, and must meet the qualifications prescribed below.

The residence of applicants is not restricted, but applicants placed on the eligible registers who live in the jurisdiction to be served will be certified first.

REQUIRED KNOWLEDGES, ABILITIES AND TRAINING: Graduation from a standard high school, or equivalent; good knowledge of elementary mathematics; manual skill and aptitude for acquiring skill in the use of engineering instruments; ability to understand and follow oral instructions; mental alertness; good judgment; courtesy; dependability; accuracy; good physical condition and good moral character.

DUTIES: Under immediate supervision to do routine work with an engineering survey party and in the office; do related work as required.

TYPICAL TASKS: Work in an engineering field survey party clearing lines of brush, weeds, et cetera; holding level rod and stadia rod in running lines, grades and cross-sections; holding range rod or plumb bob; chaining distances; driving and marking stakes; taking care of instruments.

EXAMINATION SUBJECTS AND WEIGHTS:

Written Test (Minimum Grade Required, 70%)	80%
Training and Experience	20%
Total	100%

MEDICAL EXAMINATION: Eligibles will be required to pass a medical and physical examination upon being selected for permanent appointment.

FINGERPRINTS: All applicants will be fingerprinted at the time of obtaining applications.

Examination No. 5727
Announced October 14, 1955
Revised December 3, 1956

CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
DEFENDANT'S EXHIBIT NUMBER 1983

ENABLING ACT
(as amended)
of the
PERSONNEL BOARD
OF
JEFFERSON COUNTY

The original law is Act No. 248 of the Alabama Legislature of 1945. Most of the sections have been amended. Citations to these amendments are found at the end of each section.

Occasional references are made to significant court decisions. Other selected statutes that have a bearing on the enabling statute are added at the end of the booklet.

Section 16. Examinations: The director shall prepare and conduct examinations to determine the merit, efficiency and fitness of applicants for positions. Such examinations shall be thorough and practical and shall relate to those matters which fairly test the relative capacity and fitness of the person examined to discharge the duties of the position he seeks. Whenever there is a vacancy in a position in the Classified Service where peculiar and exceptional qualifications of a scientific, professional or educational character are required, and upon satisfactory evidence that for specified reasons competition in such special case is impracticable and that the position can best be filled by the selection of some designated persons of high and recognized attainments in such qualities, the board, upon recommendation of the director, may suspend the examination requirements in such case, but no suspension shall be general in its application to such place or position, and all cases of suspension with the reasons for such action in each case shall be reported to the citizens supervisory commission at its next regular meeting. In the case of laborers, or semi-skilled occupations, the director may rate the applicants solely on experience, physical qualifications and diligence which may be determined by such evidence and in such manner as may be directed by the board. Such applicant may be required to take such further tests as the director with the approval of the board deems necessary. The director shall prepare a list of minimum requirements which the applicants must possess before they are

eligible to participate in any specific examination. He shall determine the relative weight which shall be allowed for written examinations, for oral examinations and for training and experience. The director shall require an applicant to file in the personnel office, in accordance with the rules and regulations, a formal application before he is admitted to any examination. Blank forms for such applications will be furnished by the director. The director may require in connection with applications, such evicence [sic] of residence, citizenship and right to vote and certificates of physicians, public officers, former employers or associates or others having knowledge of the applicant as the good of the service may require. The director may refuse to examine, or after examination refuse to certify as eligible anyone who is found to lack any of the established minimum requirements for the examination or position for which he applies or who is physically so disabled as to be unfit to perform the duties of the position to which he seeks appointment or who has been guilty of crime involving moral turpitude, or infamous or disgraceful conduct or who has been dismissed from the public service for delinquency or misconduct or who has intentionally made a false statement of any material fact or practiced or attempted to practice any deception or fraud in his application, in his examination or in securing his eligibility. Any person appointed to a position who has secured his place on the eligible list through fraud shall be removed by the appointing officer and shall not thereafter be eligible for examination for any position except by unanimous permission of the board. An eligible list containing the names of all persons who successfully passed the examination, ranked in order of their final earned average, from highest to lowest, shall be established as a result of each examination. The effective term of each list shall be fixed by the board at not less than one year. No person shall wilfully or corruptly make a false mark, grade, estimate or report on an examination or with respect to the proper standing of any person examined under the this Act or wilfully or corruptly make any false representation concerning the same or concerning any person examined or furnish to anyone special or secret information for the purpose of improving or injuring the prospects or chances of the appointment, employment or promotion of any person so examined or to be examined. Any person guilty of the above acts shall be deemed

guilty of a misdemeanor. (As amended by Act No. 591, 1967; Act No. 684, 1977.)

Section 17. Efficiency records. The director of personnel shall rate and preserve the records of individual efficiency of all persons holding positions under the provisions of this Act. Such ratings will be submitted on forms prescribed by the director of personnel and will be made by the department heads or their supervising officers or both in accordance with regulations prescribed by the personnel board. Such efficiency ratings shall constitute grounds for: Increase in the rate of compensation for employees who have not attained the maximum rate for the class to which their positions are allotted; continuance at the existing rate of compensation without increase or decrease; decrease in the rate of compensation for the employees who are receiving more than the minimum rate for the class to which their positions are allocated; promotion, demotion, lay-off, transfer or dismissal.

Section 18. Appointments. Vacancies in the classified service shall be filled either by transfer, promotion, appointment, reappointment or demotion. Whenever a vacancy in an existing position is to be filled by appointment the appointing authority shall submit to the director a statement of the title of the position, and if requested by the director to do so, the duties of the position and desired qualifications of the person to be appointed, and a request that the director certify him the names of persons eligible for appointment to the position. The director shall thereupon certify to the appointing authority the names of the three ranking eligibles from the most appropriate register, and if more than one vacancy is to be filled the name of one additional eligible for each additional vacancy, or all the names on the register if there are fewer than three. The director shall, upon the request of the appointing authority, add to any such certification for employment the name of any person who is certified by the director of the division of rehabilitation and crippled children of the state department of education, as being eligible for rehabilitation services, or who is certified by a physician duly licensed to practice medicine in the State of Alabama to have a permanent neurological, muscular, skeletal or other physical impairment rendering such person unable to transport himself from place to place in a normal manner

without the use of transportive devices such as a wheelchair or supportive devices such as braces, crutches, or both; but the director may nevertheless not give preference in certification for employment to any handicapped person if he finds such person is physically or otherwise unfit to perform effectively the duties of the position in which he or she seeks employment. The personnel board shall adopt appropriate rules and regulations governing all appointments to vacancies in the classified service to the end that such rules shall comply with the law and serve the public interest. In the event that a jurisdiction accepts and utilizes Federal funds for the creation of public employment opportunities, such positions when budgeted on a full time basis for twelve months, shall be treated as any other regular position in the classified service. Should the applicable Federal regulations controlling the use of such funds prescribe the unusual or exceptional prerequisites for employment in said program, the director subject to approval of the board, may prescribe the manner in which the position shall be filled and related conditions of employment. If it should prove impossible to locate any of the persons so certified or should it become known to the director that any person is not willing to accept the position, the appointing authority may request that additional names be certified. Within ten days after such names are certified the appointing authority shall appoint one of those whose names are certified to each vacancy which he is to fill. When a new position is created by the governing body the appointing authority shall notify the director of of [sic] the duties of the position and the desired qualifications of the person to be appointed. If there is no appropriate eligible list from which certification can be made, the director shall establish such a list within forty-five days after receipt of the request and no provisional appointment shall be authorized within that time except with the unanimous approval of the board. The appointing authority shall report to the director the name of the person appointed, the effective date of appointment, and such other information as may be required. The names of remaining eligibles certified shall be returned to the eligible list for certification to the next vacancy which may occur. The name of an eligible may be removed from the eligible list after it has been certified and refused three times. All appointments shall be made for a probationary period of twelve months. During

such period the appointing authority may remove an appointee upon filing with the director, in writing, his reasons for such action which action shall not be reviewable. After the expiration of the probationary period the employees shall have earned permanent status subject to the provisions of this subdivision as to removals, suspensions and changes. No person shall be appointed under any title not appropriate to the duties of the position to which he is appointed except by consent of the director. When the position to be filled involves fiduciary or financial responsibility or law enforcement, the appointing power or the board may require the applicant to furnish a reasonable bond or other security in an amount and form to be fixed by the appointing authority subject to the approval of the board provided that where the amount and terms of such bonds are now prescribed by law, such provision of law shall remain in effect. Said bond or security shall be approved by the appointing power and kept by it and conditioned as it prescribes unless otherwise now provided by law. The appointing authority in all cases not excepted or exempted under the provisions of this subdivision or the constitution of the state shall fill positions in the county or municipalities therein, by appointment, including cases of transfer, reinstatement, promotions and demotions, in strict accordance with the provisions of this subdivision and the rules and regulations prescribed from time to time hereunder and not otherwise. In the event an appointing authority fails or refuses to fill a vacancy in an existing position from a certified list of eligibles the director may refuse to certify the payroll, voucher or account of any ineligible person found to be performing the duties of said position. When there is no eligible list from which a vacancy in an existing position may be filled, the director may certify to the appointing authority the names of all person who have filed notice of their intention to take an examination appropriate to the position, and who after investigation appear to have had experience or training which qualify them for the position, and a provisional appointment from among the number may be made by the appointing authority pending the establishment of an eligible list. No provisional appointment shall be continued for a period of over ten days after the establishment of an eligible list and in no event shall be continued for a longer period than four months. During present war emergency period the director may, in the absence

of any appropriate eligible list, authorize a limited tenure appointment without examination. Such appointment shall be for not longer than the duration of the present war emergency plus six months, and shall give persons so appointed no status in the Classified Service by reason of such duration appointment. (As amended by Act No. 591, 1967; Act No. 677, 1977; Act No. 684, 1977.)

Section 20. Promotions. With the discretion of the director of personnel, vacancies in positions shall be filled, in so far as practicable by promotion from among employees holding positions in the classified service. Promotions shall be based upon merit and competition and upon the superior qualifications of the person promoted as shown by his records of efficiency. Upon receipt of a Requisition for Certification from an Appointing Authority, the Director shall thereupon certify, to the Appointing Authority, the names of the three ranking eligibles from the most appropriate register, and if more than one vacancy is to be filled, the name of one additional eligible for each additional vacancy. However, in case of a vacancy in a position which requires peculiar and particular training and experience which, in the judgment of the board, may be properly acquired in the office of [sic] department in which the vacancy exists but not elsewhere, and it can be shown to the satisfaction of the board that there is in such office or department an employee who was regularly appointed and who is serving in a lower or different class or position following regular appointment, and whose familiarity with the duties of the position vacant and whose ascertained merit in performing or assisting in such work make it desirable for the best interests of the service to suspend competition, the board may, after a public hearing, approve the promotion of such employee, either without examination or with such tests or evidence of fitness as the board may see fit to require. Notice of the public hearing held under this section shall be given by mailing or delivering a copy of the notice to each governing body and/or appointing authority and/or department head affected, and by posting a copy of said notice publicly in the office of the board for at least three days prior to said hearing. All such cases shall be fully set forth in the minutes of the board. No suspension of competition for promotion authorized under this section shall be general in its application to such place or position and all such cases of suspension with the reasons for such action in each case shall be reported to the citizens supervisory commission at its next regular meeting. When promotional examinations are given, all employees who attain a passing grade shall have

added to that grade one point for each year of service up to and including twenty years, irrespective of whether such service is continuous or not. (As amended by Act No. 283, 1947; Act No. 684, 1977.)

Section 25. Political Activities Prohibited. No person shall be appointed or promoted to, or demoted or dismissed from any position, or in any way favored or discriminated against with respect to employment because of his political or religious opinions or affiliations or his race. No person shall seek or attempt to use any political endorsement in connection with any appointment to a position. No person shall use or promise to use, directly, or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration. No employee and no member of the board shall, directly or indirectly, pay or promise to pay any assessment, subscription, or contribution for any political organization or purpose, or solicit or take any part in soliciting any such assessment, subscription or contribution. No person shall solicit any such assessment, subscription or contribution of any employee. No employee shall be a member of any national, state or local committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and cast his vote. Any officer or employee under the jurisdiction of this subdivision who violates any of the foregoing provisions of this section shall forfeit his office or position. Provided that nothing in this section shall be construed so as to deny the right of a public servant to petition his city, county, state or national government. (Amended by Act No. 591, 1967.)

Note: Act No. 819 (1978) in effect revises this section, though Section 25 technically remains part of the statute. Act No. 819 is attached at the end of this Act. See also *Still v. Personnel Board* Jefferson County Circuit Court No. CV-78-503-740-WAT (1980).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

STIPULATION

IT IS HEREBY STIPULATED, by and between the parties, for purposes of this litigation only, that the following facts are deemed to be true and correct:

I. FACTUAL STIPULATIONS

A. Population of Birmingham and Jefferson County, Alabama.

1. In 1960, the population of Jefferson County, Alabama, was approximately 34.6% black and 65.4% white.

2. In 1960, the population of the City of Birmingham, Alabama, was approximately 39.6% black and 60.3% white.

3. In 1960, the labor force in the City of Birmingham, Alabama, was approximately 24.53% black and 75.47% white.

4. In 1960, the labor force of Jefferson County, Alabama, was approximately 30.98% black and 69.12% white.

5. In 1970, the population of Jefferson County, Alabama, was approximately 32% black and 68% white.

6. In 1970, the population of the City of Birmingham, Alabama, was approximately 42.0% black and 57.8% white.

7. In 1970, the civilian labor force in the City of Birmingham, Alabama, was approximately 36% black and 63% white.

8. In 1970, the civilian labor force of Jefferson County, Alabama, was approximately 27.17% black and 72.83% white.

9. In 1980, the population of Jefferson County, Alabama, was approximately 33.3% black and 66.2% white.

10. In 1980, the population of the City of Birmingham, Alabama, was approximately 55.86% black and 44.06% white.

11. In 1980, the civilian labor force in the City of Birmingham, Alabama, was approximately 49.90% black and 50.10% white.

12. In 1980, the civilian labor force of Jefferson County, Alabama, was approximately 28.08% black and 71.92% white.

B. The Classified Work Force of the City of Birmingham.

1. As of January 1, 1966, the City of Birmingham had over 1,600 classified employees: less than one percent (1%) were black.

2. In July 1971, the City of Birmingham had over 2,000 classified employees: less than six percent (6%) were black.

3. In July 1972, the City of Birmingham had over 2,100 classified employees: less than seven percent (7%) were black.

4. In September 1974, the City of Birmingham had at least 2,200 classified employees: less than eight percent (8%) were black.

5. In December 1976, the City of Birmingham had more than 2,200 classified employees: between twenty-three percent (23%) and twenty-five percent (25%) were black.

C. Unclassified Work Force.

1. Between December 1974 and October 1983, the City of Birmingham had an unclassified work force which was between seventy percent (70%) and seventy-seven percent (77%) black.

2. Between 1974 and 1983, the total number of unclassified employees employed by the City of Birmingham fluctuated between 500 and 875.

D. Firefighter Hiring by the City of Birmingham.

1. Between 1965 and 1967, no blacks were hired as firefighters by the City of Birmingham.

2. In 1968, one black was hired by the City of Birmingham as a firefighter.

3. Between 1969 and 1973, no blacks were hired by the City of Birmingham as firefighters.

4. Between 1965 and 1973, approximately 300 individuals were hired by the City of Birmingham as firefighters.

5. As of June 30, 1976, only 9 of the 630 firefighters were black.

6. In 1977, of the 114 individuals hired by the City of Birmingham as firefighters, 34 (29.8%) were black and 80 (70.2%) were white.

7. In 1978, of the 29 individuals hired by the City of Birmingham as firefighters, 9 (31.0%) were black and 20 (69.0%) were white.

8. The following chart sets forth the dates each of the listed individuals obtained the indicated status within the Birmingham Fire and Rescue Service:

Name	Paid as Leadworker	Qualified as Medic	Qualified as Driver/ Asst. Driver
Floyd E. Click	7/17/76		9/71
James D. Morgan	7/17/76		4/75
Joel Allen Day	1/1/77		9/71
Gene E. Northington			1/79
Vincent J. Vella	4/23/77		9/72
			3/74
Lane L. Denard		8/2/76	
Woodrow Laster			
Carl J. Harper			3/78
Tony G. Jackson			8/79
Ebb C. Hinton			5/78
James E. Laster		12/13/80	
Robert K. Wilks	7/17/76		9/74

Name	Paid as Leadworker	Qualified as Medic	Qualified as Driver/ Asst. Driver
Alphonso Davis		1/22/83	5/78
Ray C. McGuire			10/77
Carl V. Cook			
Bruce R. Millsap			7/79
John E. Garvich		3/11/82	7/76
James W. Henson		7/12/81	6/78
Jack A. Freeman	8/20/83		4/83
Eugene Baldwin			8/84
Albert J. Isaac			
Calvin T. Echols			
Jackie E. Barton			
Benjamin F. Garrett			
Stephen C. Carroll			
Alvin B. Von Hagel	1/1/77		2/74
			9/71

E. Fire Lieutenant Promotions in the Birmingham Fire and Rescue Service.

1. Between 1965 and April 23, 1982, no black had ever been promoted to Fire Lieutenant in the City of Birmingham Fire and Rescue Service.

2. The following chart indicates by year the number of whites promoted to and serving as Fire Lieutenant in the Birmingham Fire and Rescue Service:

Year	Promotions to Lieutenant	Incumbent Lieutenants (as of Jan. 1)
1965	7	65
1966	11	67
1967	11	68
1968	11	68
1969	5	72
1970	3	77
1971	5	79
1972	8	81
1973	9	82
1974	16	81

1975	14	92
1976	18	99
1977	13	109
1978	5	111
1979	1	107
1980	1	109
1981	10	102
TOTAL	148	

3. The following chart sets forth by examination those persons promoted to Fire Lieutenant by the Birmingham Fire and Rescue Service:

Examination Date / Name	Race	Register Rank	Promotion Date
October 1980 Exam			
Larry D. Miskelly	White	6	8/22/81*
James L. Wint	White	7	8/22/81*
Robert C. Sorrell	White	8	8/22/81*
James W. Turner	White	9	11/28/81
John S. Payne	White	10	12/12/81

*Official Records reflect this date. Plaintiffs reserve right to challenge this date.

January 1982 Exam			
James A. Bennett	White	1	4/23/82
James E. Laster	Black	23	4/23/82
Ebb C. Hinton	Black	53	4/23/82
Tony G. Jackson	Black	60	4/23/82
Carl J. Harper	Black	95	4/23/82
Woodrow Laster	Black	107	5/15/82
Floyd E. Click	White	2	9/4/82
James D. Morgan	White	3	10/30/82
Joel Allen Day	White	4	1/22/83
Gene E. Northington	White	5	3/19/83
Vincent J. Vella	White	6	3/19/83
Lane L. Denard	White	7	3/19/83

Examination Date / Name	Race	Register Rank	Promotion Date
March 1983 Exam			
Robert L. Brodrecht	White	1	8/6/83
Carlice E. Payne	White	2	8/6/83
Alphonso Davis	Black	80	8/6/83
Ray C. McGuire	Black	83	8/6/83
Carl V. Cook	Black	85	8/6/83
October 1984 Exam			
Jack A. Freeman	White	1	6/8/85
Forney E. Howard	White	2	6/8/85
Alan J. Martin	White	3	6/8/85
Eugene Baldwin	Black	77	6/8/85
Albert J. Isaac	Black	80	6/8/85
Calvin T. Echols	Black	82	6/8/85
Jackie E. Barton	Black	86	6/8/85
Michael J. Sewell	White	4	7/6/85
Robert W. Ezekiel	White	5	7/6/85
Benjamin F. Garrett	Black	87	7/6/85

4. The following chart sets forth by examination those persons certified by the Personnel Board of Jefferson County to the City of Birmingham for the position of Fire Lieutenant but not selected by the City:

Examination Date / Name	Race	Register Rank
October 1980 Exam		
Leo F. Hicks	White	11
Charles R. Owens II	White	12
January 1982 Exam		
Robert K. Wilks	White	8
Raymond K. Harris	White	9
Henry Ward, Jr.	Black	81
Paul Roper, Jr.	Black	96
Ray C. McGuire	Black	111
George C. Gunn	Black	114
Eugene Bald	Black	117

Examination Date Name	Race	Register Rank
March 1983 Exam		
Robert K. Wilks	White	3
R. Bruce Millsap	White	4
John E. Garvich	White	5
James W. Henson	White	6
Jack A. Freeman	White	7
Henry Ward, Jr.	Black	62
Fred Lee Plump	Black	87
October 1984 Exam		
Stephen C. Carroll	White	6
Alvin B. Von Hagel	White	7
John E. Garvich	White	8
Robert K. Wilks	White	9

F. Fire Captain Promotions in the Birmingham Fire and Rescue Service.

1. Between 1965 and September 10, 1983, no black had ever been promoted to Fire Captain in the City of Birmingham Fire and Rescue Service.

2. The following chart indicates by year the number of whites promoted to and serving as Fire Captain in the Birmingham Fire and Rescue Service:

Year	Promotions to Fire Captain	Incumbent Fire Captains (as of Jan. 1)
1965	2	30
1966	7	31
1967	7	30
1968	4	30
1969	1	32
1970	2	33
1971	1	33
1972	5	33
1973	3	31
1974	4	29
1975	3	31

Year	Promotions to Fire Captain	Incumbent Fire Captains (as of Jan. 1)
1976	3	30
1977	3	31
1978	2	31
1979	3	29
1980	0	31
1981	10	28
1982	3	31
TOTAL	63	

3. The following chart sets forth for the August 1983 Fire Captain examination those persons promoted to Fire Captain by the Birmingham Fire and Rescue Service:

Examination Date Name	Race	Register Rank	Promotion Date
Tony G. Jackson	Black	28	9/10/83
David Alan Brand	White	1	9/17/83
Michael W. Martin	White	2	5/12/84
Howard E. Pope	White	3	9/15/84

4. The following chart sets forth for the August 1983 Fire Captain examination those persons certified by the Personnel Board of Jefferson County to the City of Birmingham for the position of Fire Captain but not selected by the City:

Examination Date Name	Race	Register Rank
Charles E. Carlin	White	4
Jimmy Wayne Perkins	White	5

G. Promotion by the City of Birmingham to the Position of Fire Battalion Chief or Higher.

1. Since 1965, no black has ever been promoted to Fire Battalion Chief or any higher rank in the Birmingham Fire and Rescue Service.

2. The following chart indicates by year the number of whites promoted to and serving as Battalion Chief in the Birmingham Fire and Rescue Service:

Year	Promotions to Battalion Chief	Incumbent Battalion Chiefs (as of Jan. 1)
1965	0	14
1966	0	14
1967	6	14
1968	0	14
1969	0	15
1970	2	15
1971	0	16
1972	2	16
1973	0	17
1974	2	15
1975	0	17
1976	0	17
1977	0	17
1978	1	17
1979	1	15
1980	1	17
1981	1	17
1982	0	15
1983	0	18
1984	1	16
TOTAL	17	

H. The Engineering Department of the City of Birmingham.

1. Between 1965 and 1970, less than five percent (5%) of the classified employees in the Engineering Department of the City of Birmingham were black.

2. As of December 31, 1976, there were at least 75 classified employees in the Engineering Department of the City of Birmingham: less than seventeen percent (17%) were black.

3. As of December 31, 1982, the Engineering Department of the City of Birmingham employed ninety-one (91) employees, of whom sixty-eight (68) or approximately seventy-five percent (75%) were white, nineteen (19) or more than twenty percent (20%) were black, four (4) were "other."

4. Between 1965 and September 3, 1982, no black was appointed to the position of Civil Engineer with the Engineering Department in the City of Birmingham.

5. As of January 1, 1982, there were two (2) Civil Engineers with the Engineering Department of the City of Birmingham. Both were white.

6. As of September 5, 1982, Lucius Thomas held one of the two Civil Engineer positions in the Engineering Department of the City of Birmingham. Lucius Thomas is black. The other position was held by a white.

7. Lucius Thomas' position of Civil Engineer was reclassified to Principal Engineering Technician. As of December 1, 1985, there were three Principal Engineering Technicians in the Engineering Department of the City of Birmingham: Two are white, one is black.

8. The following chart sets forth the June 1982 Civil Engineer examination information relating to the promotional candidates for Civil Engineer certified to the City of Birmingham by the Personnel Board of Jefferson County:

Examination Date Name	Race	Register Rank	Promotion Date
David Woodall	White	1	
Kenneth Ware	White	2	
Danny Laughlin	White	3	
Lucius Thomas	Black	9	9/4/82

* * *

III. HISTORICAL DATA

1. This stipulation was developed in the course of this litigation for litigation purposes only.

December 13, 1985

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[Exhibits omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

STIPULATION

IT IS STIPULATED AND AGREED, by and between the parties, through their respective counsel, that the deposition of **O. NEAL GALLANT** may be taken before Gary N. Morgan, Registered Professional Reporter, Commissioner and Notary Public, State at Large, at 1500 Park Place Tower, Birmingham, Alabama, on the 18th day of June, 1985, commencing at 2:05 P.M.

* * *

[Page 168]

Q. Chief, have you ever discriminated against black people?

A. No, I have not.

Q. To your knowledge, has the fire department ever discriminated against black people?

A. No, I don't believe it has.

[Page 169]

Q. Has the fire department or the fire service ever made any studies during your tenure as assistant Chief or Chief of whether it has engaged in discriminatory practices towards blacks?

A. No study that I know of.

[PX 31]

Q. Okay. Has the fire department ever made any findings of discrimination by the fire service?

A. You talking about Birmingham?

Q. Has the Birmingham Fire Service ever made a finding that it has engaged in discrimination toward blacks?

A. No.

MR. ALEXANDER: I'm going to object to the form of the question.

Q. Then your answer is?

A. No.

Q. Okay. They came at the same time. That's why I — Chief, during your tenure as Fire Chief, a number of black persons, black fire fighters, have been promoted to Fire Lieutenant, is that right?

[Page 170]

A. Yes.

Q. Have any of these blacks who have been promoted ever been determined by the fire service to have been victims of racial discrimination?

MR. ALEXANDER: I'm going to object to the form of the question. You may answer.

A. Would you repeat?

Q. Have any of the black persons who have been promoted to Fire Lieutenant during your tenure as Fire Chief ever been determined or found by the fire service or by you to be victims of discrimination?

MR. ALEXANDER: Same objection. You may answer.

Q. Racial discrimination.

A. No.

Q. Have any of the blacks who have been promoted to Fire Lieutenant ever been discriminated against on the basis of their race by the fire service, to your knowledge?

MR. ALEXANDER: Object to the form of the question. You may answer.

[Page 171]

A. No.

Q. Have any of the blacks who have been promoted to Fire Lieutenant ever been discriminated against on the basis of their race, to your knowledge, by the City of Birmingham?

MR. ALEXANDER: I object to the form of the question. You may answer.

A. No.

* * *

[Page 216]

Q. Has the fire service engaged in a process during the past several years of providing preferential consideration to blacks who are certified for a promotion?

MR. ALEXANDER: Object to the form of the question. You may answer.

A. Would you repeat it?

[Page 217]

Q. Would you read it back, please?

(Record read).

A. We operate under a consent decree and affirmative action plan, if this would mean that. We have a consent decree, and we have an affirmative action plan we operate under.

Q. Do you understand those items to require preferential treatment for blacks?

MR. ALEXANDER: Object to the form. You may answer.

A. I understand that there's — in promotions or employing it is set aside in the consent decree that we employ blacks in numbers to whites like that, fifty percent.

Q. Okay. You understand that in the decree fifty percent of the promotions are set aside for blacks?

A. Under the consent decree if they are qualified.

* * *

[Page 233]

Q. Okay. If a firefighter takes the Fire Lieutenants test and is third on the Personnel Board register and that given year seven people are promoted off the list, does that third person have a — an expectation that he would be promoted if found qualified by the Fire Chief?

MR. ALEXANDER: I'm going to object to the form of the question. You may answer.

A. If he — if he knew he was going to be certified third, he would expect to be promoted.

Q. If they were going to make seven promotions that year?

A. He would expect us to promote him if he was certified to us in the third position.

* * *

[Page 236]

Q. Chief, how do you believe one can best determine who is best qualified among a given group of people to perform the duties of a Fire Lieutenant?

A. Repeat that.

Q. Would you read it back, please, Gary?

(Record read).

A. I could get some people in our department, drills and training people, our officers and set us up a system similar maybe to the Personnel Board. However, this would be a big

deal for us. I believe there's a better way than we're selecting them now.

* * *

[Page 243]

Q. Prior to the announcement of the consent decree, did you have any knowledge that promotions in the fire department were the subject of any litigation?

A. Any actual official knowledge of it or just rumor? Rumor was all I had that there was a consent decree, and I didn't know what was in it until I got it.

Q. Okay. Prior to receiving word that a consent decree was signed or the announcement of

[Page 244]

the consent decree or any newspaper reports of the consent decree itself, did you have any knowledge that there were any lawsuits pending that involved promotions in the fire department?

A. Not specifically what it involved. I knew there was some litigation going on.

Q. Did you know that that litigation involved fire department promotions?

A. No, I didn't know really what it involved at all.

Q. Attached to the August 20, 1981 memo which is Exhibit 3 to your deposition is a copy of an executive order from the Mayor, is that correct, page two?

A. It is.

Q. And is that an order which you are required to follow?

A. I am.

Q. And does that order require you to adopt the plan which is attached to the executive order as attachment A?

A. Each department head is — yeah, yes. And —

[Page 245]

Q. And in compliance with this executive order from the Mayor, did you in fact adopt the affirmative action plan based on Exhibit A to the executive order?

A. I did.

Q. Now, did the fire service have any discretion in whether to adopt this plan?

A. No.

* * *

[Page 246]

Q. In filling out the — the — the plan

[Page 247]

for the fire department, did — were there any — was there any investigation of any alleged discriminatory activities of the fire department made?

A. By who?

Q. By you or Chief Laughlin or any of your subordinates.

A. No.

* * *

[Page 249]

Q. Do you have any knowledge of any limitation by the consent decree on the promotion of less qualified persons?

A. I'm not that familiar with that part of it. Mostly what it —

Q. Does the affirmative action plan that you've adopted for the fire department have any provision in it with respect to whether less qualified persons may be promoted?

A. Not that I'm aware of.

* * *

[Page 311]

Q. Do you tell fire fighters who are certified for promotion but not promoted that you would be willing to promote them if that particular individual is reached on the list?

A. Yes.

Q. And as I understand your testimony you just go straight down the list and pick up the next down?

A. Right.

* * *

[Page 325]

Q. At the time Tony Jackson was certified for the position of Captain, did you form a judgment of whether he was qualified to be a Captain?

A. I had no reason to form a judgment at the time he was promoted to a Lieutenant.

Q. I'm talking about when he was promoted to Captain, sir.

A. Give me the question again.

Q. At the time Tony Jackson was promoted to Captain, did you form a judgment as to

[Page 326]

whether he was qualified to perform the duties of a Captain?

A. No, I did not.

Q. You did not?

A. No, I did not.

Q. Did you compare Tony Jackson's — at the time that you promoted Tony Jackson to Captain, did you form an opinion as to whether — strike that again.

At the time you promoted Tony Jackson to Captain, did you compare his qualifications to perform the duties of Fire Captain to those of David Brand?

A. I did not.

Q. At the time you promoted Tony Jackson to Captain, did you compare his qualifications to perform the duties of Fire Captain to those of Mickey Martin?

A. I did not.

Q. And I believe you earlier testified that you did not compare Jackson's qualifications to those of Gene Pope, is that right?

[Page 327]

A. I think so. I don't compare on this.

* * *

[Page 347]

Q. When you received this certification, what process did you go through?

A. Our normal process would have been for Chief Laughlin to have the secretary, whoever the secretary was there, to notify these

[Page 348]

people, set up an appointment for an interview. They would have came in and Chief Laughlin and I would have held an interview with them. And then we would have made a decision, and the decision is over here, action taken. That's the action we have taken.

Q. Upon what factors do you make your decision?

A. On this one with the first — I'm assuming the first certification with any blacks on it. We had promoted the whites before. We had a — six positions to fill, and we promoted — we promoted four blacks and one white off of this list, and we had six positions, so this would have still left us one vacancy.

Q. Other than the fact that you had six factors in the race of the individuals — strike that.

Other than the fact that you had six vacancies and the race of the individuals, did you consider anything else in processing this certification?

A. No, I didn't.

[Page 349]

Q. Did you compare the qualifications of the individuals on the list one to another?

A. Did not.

Q. Did you determine who on the list was the best qualified or lesser qualified?

A. I did not.

Q. Did you make an independent determination with respect to each individual of whether or not they were in fact qualified to perform the duties of Fire Lieutenant?

A. Not other than that they were certified to us as being qualified.

* * *

[Page 350]

Q. As I understand your testimony, you've never at any time determined who on this list is best qualified or lesser qualified or anything of that sort?

A. No.

* * *

[Page 351]

Q. Did you ever make an independent determination separate from the Personnel

[Page 352]

Board's certification of these individuals to you that the individuals on this list, excluding Mr. Ward, were qualified or unqualified?

A. Didn't make any determination.

* * *

Q. If James Laster had been white — if — let's put it this way. If Laster, Hinton, Jackson, Ward and Harper were all white and you got this list of thirteen people, it's your testimony that you would have selected Bennett,

[Page 353]

Click, Morgan, Day, Northington and Vella?

MR. ALEXANDER: Object to the form of the question. You may answer.

Q. Recommended.

MR. ALEXANDER: Same objection. You may answer.

A. I would have went right down from one through six.

Q. Was James Laster's race the controlling factor in his selection for the position of Fire Lieutenant?

MR. ALEXANDER: Object to the form of the question. You may answer.

A. Give it back to me.

(Record read).

A. Under the consent decree and affirmative action, this placed him in a position to be promoted.

Q. So your answer is yes?

A. Yes.

Q. Was Ebb Hinton's race the controlling factor in your recommendation of him for the position of Fire Lieutenant?

[Page 354]

MR. ALEXANDER: Object to the form of the question. You may answer.

A. It was determined by the consent decree and the affirmative action plan that we had that we were to promote blacks.

Q. As I understand your testimony, you had no discretion in the matter?

MR. ALEXANDER: Object to the form of the question. You can answer.

A. Went by the consent decree and the affirmative action plan.

Q. And do you understand them to have required you to promote Laster, Hinton, Jackson and Harper?

MR. ALEXANDER: Object to the form of the question. You can answer.

A. The consent decree did cause us to promote those people.

Q. Did it require you to promote them, sir?

MR. ALEXANDER: Object to the form of the question. You can answer.

A. To meet the consent decree, yes.

[Page 355]

Q. Why did the consent decree require you to promote those persons?

A. Under the consent decree, we had to have an affirmative action plan. The affirmative action plan was to promote on the basis of fifty percent of blacks and whites.

Q. Any other reason, sir?

A. No, there wasn't.

* * *

[Page 365]

Q. Had Woodrow Laster been white would he have been selected from supplement certification 540B?

MR. ALEXANDER: Object to the form. You can answer.

A. No, we would have started at the top one, two, three, four.

Q. You would have selected Floyd Click?

A. Would have.

* * *

[Page 390]

Q. When you received these two certifications, you selected five persons for promotion, is that correct?

A. I did.

Q. And who were the five that you recommended to the Mayor for promotion?

A. R. L. Brodrecht, Carlice Payne, Alphonso Davis, R. C. McGuire and Carl V. Cook.

Q. Did you compare the qualifications of the individuals on these two lists to each other?

A. I did not.

Q. Did you make any determination of whether any of the individuals on the two lists were better qualified than each other?

A. I did not.

Q. Did you make any determination of whether Mr. Wilks was better qualified or less qualified than any of the persons who were promoted?

A. I did not.

Q. Did you make any determination of

[Page 391]

whether Mr. Davis was demonstrably less qualified than Mr. Wilks?

A. I did not.

Q. There was no comparison made whatsoever, is that correct?

A. No, sir. No.

Q. No, no comparison?

A. No, no comparison, yes.

Q. Okay. Why was Mr. Brodrecht selected?

A. He was in number one — he was — we were going to promote five, and he was in number one position.

Q. Did you make a determination of how many whites and how many blacks that you were going to promote?

A. We had promoted more whites on the previous examination than we had blacks. We had got out of our affirmative action plan, but we wasn't going to try to catch it up all at one time, so I determined that we would go back to the one on one. On the new list, we would go back to one on one and not taking into consideration that we had promoted four or five

[Page 392]

blacks, so the first man I promoted was a black. The next man was a — I believe we determined that we would try to get back in line by going one and two instead of one and one.

So we went — we promoted — I don't remember just how we did it, but we wasn't going to — we wasn't trying to catch up all at one time. We knew we were off on our affirmative action plan, and I believe we seemed like we decided we would go one on one — just start out like it was a new ball game and go one on one. I don't know if that reflects this or not. It's been so long ago I don't remember.

Q. Did Mr. Graham approve that plan?

A. When we sent it back through the channels, it came back approved.

Q. Did you talk with him about that before you did it?

A. May have. I believe that I did probably talk to Mr. Graham about it because it was — we were — there was some doubt on the — in my mind on the consent decree whether we would legally need to catch up or whether we had

[Page 393]

some period of time, and I probably did talk to Mr. Graham since he was the City's affirmative action officer.

Q. And what did Mr. Graham tell you?

A. Apparently he said go ahead and do whatever you want to. Because that's what we did. I don't remember just — I don't remember the conversation.

* * *

[Page 395]

Q. Why was Ray McGuire selected?

A. Mr. McGuire was in third position,

[Page 396]

and we had five openings, and we promoted two whites and three blacks.

Q. The same for Mr. Cook in fourth position?

A. Yes.

Q. Were there any other factors that you considered in selecting Davis, McGuire and Cook?

A. None.

Q. Other than where they were on the list and the fact that they were black?

MR. ALEXANDER: Object to the form of the question. You may answer.

A. The number that they were on the list and to fill the affirmative action plan under the consent decree.

Q. Which was to promote blacks?

A. Promote blacks.

* * *

[Page 404]

Q. Pursuant to those two certifications, how many people were selected for promotion to Fire Captain?

A. There was two.

Q. Did you evaluate the qualifications of the people on these two lists?

A. I did not.

Q. Did you compare the qualifications of the people on the two lists?

A. I did not.

* * *

[Page 407]

Q. Chief, do you have a judgment of

[Page 408]

whether on September 10, 1983 David Brand or Tony Jackson was better qualified to perform the duties of a Fire Captain?

A. I don't make that judgment.

Q. You don't — you don't have any judgment one way or another?

A. Not one way or another.

Q. And you don't have a judgment of whether they are equally qualified as well, do you?

A. No. Brand or anybody else or the other people on the same list with him, I cannot — I can't make a judgment.

Q. Chief, not only have you not made judgments that people are better qualified or less qualified than each other, but you haven't determined that they are equally qualified, have you?

A. I have not.

Q. And not only is that true with respect to the Captain promotions, but that's also true with respect to all of these Lieutenant promotions that we've been talking

[Page 409]

about, is that right?

A. I do not compare them. If that's the question you are asking, I do compare them, no.

Q. Okay. And you have not determined that they are equally or relatively — or somewhat equally qualified either?

A. No.

Q. And you've never determined that?

A. Never. Go by the Personnel Board's qualification list.

* * *

[Page 480]

Q. You've never made any determination of whether anybody is better than the other, have you?

A. No, I haven't.

Q. And you've never tried to make that determination?

A. No. The only time that this was even — has been involved since the consent decree was with Henry Ward.

Q. And you weren't comparing Henry to

[Page 481]

any of the other folks on the list, you were just looking at Henry's minimum qualifications?

A. That's correct.

MR. ALEXANDER: Object to the form of the question. You can answer.

A. I didn't compare him with anyone else. I just felt like that he couldn't do the job.

Q. And you've never determined whether any person on any list is better qualified than any of the other people on any list?

MR. ALEXANDER: Object to the form of the question. You can answer.

A. No, I haven't.

Q. So you don't know whether anybody is demonstrably better qualified or demonstrably less qualified than anybody on any list?

MR. ALEXANDER: Object to the form of the question. You can answer it.

A. There's no way I could prove it.

* * *

[Page 489]

Q. So how many whites did you promote

[Page 490]

last time?

A. Promoted three whites.

Q. Three off the white list and four off the black list?

A. Four off the black list, right.

Q. And you are going to promote two blacks and one white this time?

A. No. The last — promoted four — previous to this seven, we had promoted several white Lieutenants. We hadn't — we had run out of the list with blacks on it. I guess that must have been the list that the judge said we couldn't hire any more blacks off of. So I started off with the blacks since a white was the last person. The last person I promoted was a black, so on this list I'll promote a white, a black and a white.

* * *

[Page 493]

Q. You never determined whether or not the whites were demonstrably better qualified or not, did you?

A. I didn't determine one way or the

[Page 494]

other.

* * *

[Page 593]

Q. And, as I understand your previous testimony, you don't assess relative qualifications of candidates certified for promotion, do you?

A. What do you mean by that?

Q. Relative, compare qualifications one to another?

A. No.

* * *

[Page 841]

Q. (BY MR. ALEXANDER:) Chief, I want to pose to you some hypothetical questions about the promotion process as you understand it to be and to have been in the fire service. And I would like for you to answer on the basis of your experience as Fire Chief or assistant Chief and your knowledge about how these decisions have been made in the service. Okay?

A. Yes, sir.

Q. Prior to 1981, and after, say, 1975 or '76, that's the time period I'd like to focus on for the moment. Okay?

A. Yes, sir.

Q. Assuming that there are two white candidates A and B for the positions of Fire Lieutenant, I would like for you to assume the following with respect to the characteristics, if you will, of the two competing candidates. Okay?

A. Yes.

Q. Candidate A has been a fire fighter since 1970. He has served at 3 stations, he has

[Page 842]

advanced to the position of assistant driver, his ratings have been — performance evaluation ratings in the eighties. Okay?

A. Yes, sir.

Q. That's candidate A. Candidate B has been employed in the fire service since 1972. He is a college graduate, he has an associate degree in addition to that from Jeff State, he has four years service in the Air Force in a fire capacity on an Air Force base, he has advanced to the position of leaderman, he has worked at Stations 1 and 6, his performance evaluations have been uniformly ninety-five. Okay.

A. Yes.

Q. With those assumptions in your mind, in your opinion, and based on your experience as Fire Chief, who would be the best qualified as between those two people to perform the duties of a Fire Lieutenant?

MR. FITZPATRICK: Object to the form.

A. B.

Q. All right, sir. Now, assume the

[Page 843]

following additional facts. A has been certified to you as first on a certification of eligibles by the Personnel Board. B has been certified to you as second. As between A and B, and based on your practice as it existed prior to 1981, who would you select?

A. A.

MR. WORTHEN: Object to the form.

Q. Why is that?

A. I would have to have more reason not to. I'd have to have — I'd have to prove that that — that A just couldn't do the job.

Q. Has that been consistent with the way the fire service made selections prior to 1981?

A. It is.

Q. Has that practice changed after 1981?

A. No, it has not.

* * *

[Page 883]

Q. Chief, Mr. Alexander gave you a hypothetical question of persons A and B. Do

[Page 884]

you recall that question?

A. I do.

Q. And I believe you testified that given A and B to choose from for the position of Fire Lieutenant you would have selected B as the best qualified person in response to his first question, is that correct?

A. Yes. That's correct. I said he was the best qualified, in my opinion.

Q. And then you stated that if they were certified to you one and two, A and B, you would have selected A?

A. I would have.

Q. Why was B better qualified to be a Fire Lieutenant than A?

A. Well, just off the top of my head and I assumed that when he said he had a college degree, I assumed it wasn't in basket weaving. When he said he had a fire science course, I assumed that it was from Jefferson State and not from down at Lafayette, Alabama. I was assuming that what he was saying

meant something. If he had a fire science course from down at Lafayette,

[Page 885]

Alabama, I would have just pushed it aside. If he had a college degree in basket weaving, that would have been no good to him, but you said hypothetical, and I was assuming that everything was right, just right.

Q. Okay. And based on that information that Mr. Alexander gave to you, you ascertained that B was better qualified?

A. Yes, I assumed he had a degree in chemistry, he had been to Jeff State to get his fire science course.

Q. Chief, taking all of the facts that Mr. Alexander set forth for you and altering them in this one respect, B is white, A is black, you're given a certification for one position. B is the first person on the first list out of the three people certified, A is first on the second page, you have not yet met your goal, and you're going to promote one person, who would you select?

A. Which list — who was —

Q. B is first on the white list?

A. Okay.

[Page 886]

Q. B is the person you determine to be best qualified. A is black, and he's first on the black list. You've not yet met your goal. Who would you select?

A. I have met — I haven't met my goal, and the last person that was — we haven't met the goal, anyway.

Q. The last person you promoted was white?

A. There you go. You've got me. I'd promote the black.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs,* v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 82-P-1852-S

CAPTION

DEPOSITION OF GORDON GRAHAM; taken in the above-styled cause pursuant to the Federal Rules of Civil Procedure, at the offices of the Law Department, 6th Floor, City Hall, Birmingham, Alabama, before Jean Crockett, Court Reporter and Notary Public, on the 15th day of November, 1982, commencing at 3:10 p.m.

* * *

[Page 5]

Q. State your name and address, please.

A. Gordon Graham, 921 Essex Road, Birmingham.

* * *

[Page 6]

Q. Okay. Please outline for the record your duties as chief personnel officer for the City of

[Page 7]

[PX 33]

Birmingham. You are still in that same classification as you entered in; is that correct?

A. Yes.

Q. Okay. Would you outline your duties, as such?

A. Yes. My duties are to direct the activities of the office of personnel, which include our personnel records, Affirmative Action, benefits, administration, occupational safety and health plan and labor relations.

* * *

[Page 33]

Q. The mayor has then, in fact, delegated to you the duty of implementing the decree within the City?

A. The prospective relief portion.

* * *

[Page 38]

Q. Have you ever instructed any department head as to how to implement the provisions of para-

[Page 39]

graph number 2 of the Consent Decree?

A. No.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

STIPULATION

IT IS STIPULATED AND AGREED, by and between the parties, through their respective counsel, that the deposition of **EUEL S. LAUGHLIN** may be taken before Donald R. Eaton, Court Reporter, Commissioner and Notary Public, State at Large, at 1500 Park Place Tower, Birmingham, Alabama, on the 15th day of July, 1985, commencing at 1:35 P.M.

* * *

[Page 87]

Q. What have your duties as assistant or deputy chief been?

A. Primarily as operations officer and personnel officer.

* * *

[Page 136]

Q. What is the affirmative action policy of the fire service with respect to promotions?

A. To as far as we can, to promote fifty percent black and fifty percent white if there's enough qualified applicants.

* * *

[Page 173]

[PX 36]

Q. So other than rank order, you also look at the race of the individuals?

A. If — we look to see if they're minorities under the consent decree.

Q. And by minorities, you look at race?

A. Race.

* * *

[Page 188]

Q. In evaluating candidates for promotion to fire lieutenant, do you compare the qualifications of individuals who are certified?

A. No.

* * *

[Page 189]

Q. Was there anything in the consent decree about relative qualifications?

A. There's a term about demonstrably better qualified in the consent decree.

Q. Tell us what your understanding of that term is?

A. I have no understanding of that term. It a subjective term. I don't know what it means.

* * *

[Page 253]

Q. Why was Ebb Hinton selected?

A. To fulfill the requirements of the consent decree. He was the second black.

Q. Had Ebb Hinton have been white, would he have been selected for promotion?

A. On this certification, no.

* * *

[Page 257]

Q. At the time Tony Jackson was selected for promotion to fire lieutenant, what factors did you and Chief Gallant consider?

A. That he was third on the list of blacks.

Q. Anything else, sir?

A. We had no other specific knowledge that I can recall.

* * *

[Page 279]

Q. Does the performance of a lead worker job help one become qualified to perform the

[Page 280]

duties of fire lieutenant?

A. Lead worker is by the nature an acting officer's role and should be of benefit.

* * *

[Page 343]

Q. How was it determined that Alphonso Davis would be promoted?

A. He was the number two on the list of black — promotees, I guess you would —

Q. Anything else enter into the decision to promote Alphonso Davis?

A. Not really.

Q. How was —

A. Nothing to my knowledge at least.

Q. How was it determined that Ray McGuire would be promoted?

A. He was the number two man, black.

Q. Anything else enter into that decision to promote McGuire?

[Page 344]

A. Not to the best of my knowledge.

Q. How was it determined that Carl Cook would be promoted?

A. He was the third black after Ward. We had attempted to reject Ward.

* * *

[Page 345]

Q. Did the fire service make a determination in July of 1983 of whether Robert K. Wilks was qualified?

A. Not at that time.

Q. Did the fire service make a determination of whether Robert B. Millsap was qualified to be a fire lieutenant in July of 1983?

A. Not at that time.

Q. Did John E. — did the fire service make a determination of whether John E. Garvich, Jr. was qualified to be a fire lieutenant in July of 1983?

A. Not at that time.

Q. Did the fire service make a determination of whether James W. Henson was qualified to be a fire lieutenant in July of 1983?

A. Not at that time.

Q. Same question with respect to Freeman?

A. Not at that time.

* * *

[Page 370]

Q. In July of 1983, did you make a determination of whether Robert B. Millsap was qualified for promotion to fire lieutenant?

A. We didn't make any judgment at all. We didn't interview him. He was on vacation and no determination was made at that time.

Q. Was he considered for promotion in July of '83?

A. He was on the certification.

Q. Was he considered by the fire service for promotion?

A. Not at this juncture.

Q. Okay. Had he been black, would he have been considered?

[Page 371]

MR. SPOTSWOOD: Object to the form.

A. I would say yes.

Q. Had Wilks been black, would he have been considered?

A. Yes.

Q. Had Wilks been black would he have been promoted?

A. I would think so.

Q. Had Millsap been black, would he have been promoted?

A. I think so.

* * *

Q. Was John Garvich considered for promotion in July of 1983?

A. Not at that point.

Q. Had John Garvich been black, would he

[Page 372]

have been considered for promotion?

MR. SPOTSWOOD: Object to the form.

A. I think so.

Q. Had John Garvich been black, would he have been considered for promotion in July of 1983?

A. I think so.

Q. Had John Garvich been black, would he have been promoted to fire lieutenant in July of 1983?

A. I think so.

* * *

[Page 431]

Q. Did you seek any facts to confirm whether or not Jackson was minimally qualified to be a fire captain?

A. No. Not to my knowledge.

Q. As I understand your testimony, the decision to promote Jackson was made prior to his interview?

A. Yes.

Q. At any time did you compare the qualifications of Jackson to be a fire captain to those of David Brand to be a fire captain?

A. No.

Q. At any time did you compare the qualifications of Michael Martin to be a fire captain to those of Jackson?

A. No.

Q. At any time did you compare the qualifications of Howard Pope to be a fire captain to those of Jackson?

A. No.

Q. In September of 1983, did you form a

[Page 432]

judgment of whether any of the individuals on certifications 823 and 823-A were better qualified than any of the other individuals?

A. No.

Q. Did you form any judgment of whether any of the individuals on 823 and 823-A were demonstrably less qualified than any of the other individuals on those same certifications?

MR. SPOTSWOOD: Object to the form.

A. No.

* * *

[Page 649]

Q. Chief, looking at the most recent

[Page 650]

certification that you've received from the Personnel Board and the promotions that have been made, would you describe that promotional process as adhering more closely to a goal or a quota?

MR. SPOTSWOOD: Object to the form of the question.

Q. As to fire lieutenant.

A. We average the fifty percent figure that's in the consent decree. I didn't — the word quota or goal didn't enter into my thinking. As the process went on, it gets to be a matter of semantics, I guess. We promoted fifty percent black and fifty percent white.

* * *

OFFICE OF THE MAYOR **Number: 35-81**

Subject: Affirmative Action Officer and Affirmative Action Plan **Page 1 of 1**

Date Effective 8/20/81

Approved:

Applies to: (x) Original Issue ( ) Revision

All Departments

I. The Chief Personnel Officer is hereby appointed Affirmative Action Officer and shall have the following responsibilities:

(a) Advise black and female employees of the terms of the Consent Decree;

(b) Post his or her office hours and location and copies of the Consent Decree in conspicuous places within each department or operational unit of the City;

(c) Receive and investigate complaints of race and sex discrimination and conciliate such complaints when appropriate, and notwithstanding any other provisions of law, establish a written procedure which shall govern such complaints;

(d) Maintain a complete record of all actions taken in pursuit of the duties outlined above, including all correspondence directed to or from the city of Birmingham with respect to any complaints or investigations undertaken pursuant to the Consent Decree; and

(e) To review, prior to that final selection, a department head's written justification for failure to select certified black or female applicants in jobs in which blacks or females are, under the terms of the Decree, underrepresented. The Affirmative Action Officer shall submit his written comments together with the department head's written justification to the Mayor, prior to final selection.

II. Each department head is to submit to the Mayor no later than August 31 of each year an affirmative action plan. The affirmative action plan is to cover a twelve month period beginning each September 1. The form and content of the affirmative action plan is given in Attachment "A".

Department heads will be evaluated, in part, on the basis of their equal employment opportunity and affirmative action efforts and results, as well as their cooperation with the City's Affirmative Action Officer.

ATTACHMENT "A"

AFFIRMATIVE ACTION PLAN
(name of department)
September 1, 1981 through August 31, 1982

I. Statement of Affirmative Action Policy

The (name of department) shall not discriminate on the basis of race, color or sex in recruiting, hiring, promotion, upgrading, training, job assignments, discharge or other disciplinary measures, compensation, or other terms and conditions or privileges of employment. Further, the (name of department) shall not retaliate against or in any way take action against any person because that person opposes or has opposed alleged discriminatory policies or practices in the City of Birmingham, or because of that person's participation in or cooperation with the investigation and trial of alleged discriminatory policies or practices, or in any proceedings therein.

II. Goals for Hiring Blacks and Females

The long term goal of the (name of department), subject to the availability of qualified applicants, is the employ-

ment of blacks and females in each job classification in the department in percentages which approximate their respective percentages in the civilian labor force of Jefferson County. For blacks the percentage is 27.6 and for females is 38.7. In order to achieve this long term goal, the (name of department) has established and will attempt to meet an annual interim goal of making probational appointments of blacks and females to vacancies in permanent, full-time positions in the classified service at the rates set forth in the Consent Decree, or at the rate of black and female representation among applicants, which ever is higher.

III. Workforce Analysis and Interim Annual Hiring Goals

Job Classification	Long Term Goal Met		Interim Annual Hiring Goal	
(list all job classifications in the dept.)	Black (state Yes or No under each heading)	Female	Black (state number to be hired under each heading)	Female

NOTE: Interim annual hiring goals subject to job openings occurring and availability of qualified applicants. (Include this statement as a footnote).

IV. Implementation of Goals

In order to further insure the possibility of achieving the goals for blacks and females, the (name of department) will request the Personnel Board to selectively certify for appointment qualified blacks and females whenever such action is necessary to provide the (name of department) with a certification list that contains sufficient numbers of blacks and females to meet departmental goals. The department shall include on each Request for Certification form to the Personnel Board, a notation requesting the Personnel Board to certify blacks and/or females where race and/or sex goals have not been met. The form of the notation will be as follows:

> "Long term goal for hiring of blacks has not been met. Please certify qualified blacks", and/or "Long term goal for hiring of females has not been met. Please certify qualified females."

In the event that Personnel Board declines, or is unable to furnish lists containing qualified blacks or females, or in the event the Personnel Board declines to eliminate from its consideration of eligibles non-validated promotional potential ratings, the (name of department) notwithstanding any state or local law, shall take whatever actions are required to comply with the terms of the Consent Decree. Such actions may include, but are not limited to:

(a) Directly recruiting blacks or females, for the purpose of supplementing any non-conforming list furnished by the Personnel Board.

(b) Considering existing black and female City employees for promotion, whether or not such candidate was certified by the Personnel Board and supplementing any such non-conforming list furnished by the Personnel Board with such persons as are deemed qualified by the City.

(c) The names and qualifications of blacks and females recruited by the (name of department) will be forwarded to the Affirmative Action Officer for submission to the Personnel Board.

V. Posting of Affirmative Action Plan

A copy of the affirmative action plan for the (name of department), upon approval by the Mayor, shall be posted (specify a conspicuous and prominent place in the main office of the department).

VI. Semi-annual Evaluation Reports

The (name department head title) will submit to the Mayor semi-annual evaluation reports of the department's affirmative action plan. Reports are due by the end of March for the six month period ending with February and by the end of September for the six month period ending with August. Each report shall include a

review of the department's progress in achieving affirmative action plan employment goals, noting the goals which were achieved and those not yet achieved, the reason for any failure to achieve goals, and the remedial action being taken to overcome any such failure. Each report shall also review affirmative action taken to insure compliance with all other provisions of the affirmative action plan.

VII. Job Posting

The (name of department) will post notices of training opportunities and vacancies within the department in either permanent, part-time or temporary positions in conspicuous places at (name the location(s)). Such notices will be posted separately from notices of vacancies in other departments. (For Police, Fire, Street and Sanitation only) The (name of department) will further insure that written notification of promotion or training opportunities within the department are contained on separate bulletin boards from notices of other interdepartmental vacancies and vacancies in other departments.

VIII. Sex Restrictions in Job Announcements and Certifications

The (name of department) shall not request that the Personnel Board restrict any job announcements or certifications on the basis of sex except where, pursuant to a proper validation study, gender is determined to constitute a bona fide occupational qualification within the meaning of Section 703(e) of Title VII for the job(s) listed in such announcements or certifications, and such determination is approved in writing by the United States.

IX. Height/Weight Requirements

The (name of department) shall not use or follow any minimum height or weight requirements which have an adverse impact against blacks of females as selection criteria for any classified service position, nor shall it

abide by any such requirements if they are instituted and administered by the Personnel Board.

X. Eligibility to Apply for Promotion to Certain Jobs

(Include only those paragraphs which apply to your department)

The Police Department shall not require police officers to serve more than three years uninterrupted service in rank (or two years uninterrupted service in rank for candidates who have two years of college credits) in order to be eligible to take the promotional examination for police sergeant, nor shall it require police sergeants to serve more than two years uninterrupted service in rank in order to be eligible to take the promotional examination for police lieutenant. Employees who have obtained permanent status as police lieutenant shall not be deemed ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank. Uninterrupted service shall include any time spent as a probationary employee.

The Fire Department shall not require firefighters to serve more than two years uninterrupted service in rank in order to be eligible to take the promotional examination for the position of fire lieutenant. Employees who have obtained permanent status as fire lieutenant or fire captain shall not be deemed ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank. Uninterrupted service shall include any time spent as a probationary employee.

In order to be eligible to take the promotional examination for the positions of public works supervisor or construction supervisor, an employee must have permanent status as a truck driver, labor supervisor, heavy equipment operator or construction equipment operator. In order to be eligible to take the promotional examination for the position of sanitation inspector, an employee must have permanent status as a truck driver or semi-skilled laborer.

Any employee who was worked full-time in an unclassified laborer position for twelve consecutive months shall be eligible to apply to take the promotional examinations for the following classifications: semi-skilled laborer, truck driver, refuse truck driver, equipment service worker, automotive mechanic helper. As used in this paragraph, the term laborer shall include the classifications of building service worker, laborer, and refuse collector.

Any employee who has obtained permanent status as a semi-skilled laborer or truck driver shall be eligible to apply to take the promotional examinations for the following classifications: truck driver, refuse truck driver, labor supervisor, heavy equipment operator, equipment service worker, autmotive mechanic helper.

Any employee who has obtained permanent status as a truck driver, heavy equipment operator, refuse truck driver, or labor supervisor shall be eligible to apply to take the promotional examination for the classification of construction equipment operator.

The (name of department) will further evaluate career ladders in order to broaden areas of consideration and bases for selection; recommend trainee classes in all instances where feasible; and otherwise eliminate non job-related barriers for promotion to higher level classes.

XI. Promotional Potential Ratings

(For departments other than Police, Fire, Street and Sanitation, and Park and Recreation) The (name of department) will continue to use the Personnel Board's current promotional potential rating system so long as it is shown to have no adverse impact. The (name of department) further agrees to discontinue the use of the Personnel Board's current promotional potential rating system to determine eligibility for promotion where, based upon any two successive rating cycles (one cycle consisting of six months), there is evidence of adverse impact against blacks or females. In determining adverse impact under this paragraph the department will rely upon section 4D

of the *Uniform Guidelines*. The Affirmative Action Officer will be promptly notified of any employee receiving a promotional potential rating of less than 85.

(For Police, Fire, Street and Sanitation, and Park and Recreation) The (name of department) shall discontinue the use of the Personnel Board's current promotional potential rating system since such ratings have been demonstrated to have had an adverse impact on blacks.

XII. Background Investigations

Background investigations will be conducted by the (name of department) in such a manner so as not unlawfully to discriminate on the basis of race or sex. Applicants for employment shall not be disqualified automatically on the basis of an arrest or conviction record, a military discharge that is less than honorable, or a poor credit rating.

In considering the effect of a criminal conviction upon an applicant's qualification, the department shall consider at least the following factors: (1) the nature of the position the applicant is seeking; (2) the nature of the crime; (3) the period of time elapsed since the conviction; and (4) the success or failure of rehabilitation efforts.

The (name of department) agrees that prior to the rejection of an applicant as a result of a background investigation, the applicant will be given a written statement of the reasons for the contemplated rejection and given the opportunity to respond orally or in writing to the reasons five days to the department head. Copies of all correspondence, notes, etc., concerning this paragraph will be sent to the Affirmative Action Officer prior to the rejection of any applicant.

XIII. Supervisory Instruction

The (job title of department head) will inform supervisory personnel that the City will not discriminate against or harass any employee or potential employee on the basis of race or sex. In addition, the (job title of department head) will instruct such personnel about their

responsibility in regard to equal employment opportunity and affirmative action. Supervisory personnel in the (name of department) will be evaluated, in part, on the basis of their equal employment opportunity and affirmative action efforts and results, as well as their cooperation with the City's Affirmative Action Officer.

XIV. Assignment to Jobs

Since a concentration of blacks or females in organizational units and job assignments may indicate bias, the (title of department head) will audit all job assignments of blacks and females in the department and take the necessary steps to eliminate concentration, if any.

XV. Facilities

The (job title of department head) will personally inspect all employee facilities of the department on a semi-annual basis to insure that such facilities are maintained in a racially integrated fashion.

XVI. Affirmative Action Committee

(Police, Fire, and Street and Sanitation only) The (name of department) will appoint an affirmative action committee composed of five members who are City employees, and who may be either incumbents in the (name of department) or individuals selected from outside the department. Such committee shall meet periodically to review the job assignment and disciplinary policies in the department in order to insure that such policies are maintained and administered in a manner that does not unlawfully discriminate against any employee because of race or sex. Such committee shall report quarterly (or more than quarterly if required by specific matters) to the Mayor or his designee. In appointing the members of such committee, the (name of department) shall insure that there are at least two blacks and one female among the members of such committee. Each committee member shall be compensated for committee work at the same rate the committee member receives in his or her job with the City.

CASE NUMBER: CV84-P-0903-S

DATE: DEC 16, 1985

PLAINTIFF'S EXHIBIT NUMBER 180

COMPARISON OF FIREFIGHTER JAMES DOUGLAS MORGAN WITH FIREFIGHTER WOODROW LASTER AS OF MAY 1982

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 5/82)	Highest Postal Station Assignment	Certified for Assistant Driver or Driver	Months as Medic or Leaderiter (as of 5/82)	Shifts as Acting Officer (as of 5/82)	Educational Pay Incentive	Other Firefighting Experience
James Douglas Morgan	178 2/	89.09	102.09	3	13	Leaderiter	April 1975	70	175	A.A.S. in Fire Science	—
Woodrow Laster	135 2/	77.36	82.36	107	5	Pilot	—	0	0	A.A.S. in Fire Science	—

1/ Total number of possible correct answers on the January 1982 fire lieutenant examination: 210.

2/ The probability of observing such a disparity in scores, if the true score of Morgan was within 4 standard errors of measurement of that of W. Laster, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Morgan exceeds the true score of W. Laster by at least 4 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 182

COMPARISON OF FIREFIGHTER JOEL ALLEN DAY
WITH FIREFIGHTER WOODROW LASTER
AS OF MAY 1982

Name	A. Raw Score 1/	B. Converted Score	C. Final Score	D. Rank on Register	E. BFRS Seniority (as of 5/82)	F. Highest Formal Station Assignment	G. Certified for Assistant Driver or Driver	H. Months as Medic or Leadworker (as of 5/82)	I. Shifts as Acting Officer (as of 5/82)	J. Educational Pay Incentive	K. Other Firefighting Experience
Joel Allen Day	151	81.73	101.73	4	20	Driver/ Leadworker	July 1971	64	100	—	—
Woodrow Laster	135	77.36	82.36	107	5	Plugman	—	0	0	A.A.S. in Fire Science	—

1/ Total number of possible correct answers on the January 1982 fire lieutenant examination: 210.

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CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 184

COMPARISON OF FIREFIGHTER LANE DENARD
WITH FIREFIGHTER WOODROW LASTER
AS OF MAY 1982

Name	A. Raw Score 1/	B. Converted Score	C. Final Score	D. Rank on Register	E. BFRS Seniority (as of 5/82)	F. Highest Formal Station Assignment	G. Certified for Assistant Driver or Driver	H. Months as Medic or Leadworker (as of 5/82)	I. Shifts as Acting Officer (as of 5/82)	J. Educational Pay Incentive	K. Other Firefighting Experience
Lane Denard	169 2/	86.64	97.64	7	11	Medic	—	70	150	EMT III	—
Woodrow Laster	135 2/	77.36	82.36	107	5	Plugman	—	0	0	A.A.S in Fire Science	—

1/ Total number of possible correct answers on the January 1982 fire lieutenant examination: 210.

2/ The probability of observing such a disparity in scores, if the true score of Denard was within 3 standard errors of measurement of that of W. Laster, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Denard exceeds the true score of W. Laster by at least 3 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S

DATE: DEC 16, 1985

PLAINTIFF'S EXHIBIT NUMBER 186

COMPARISON OF FIREFIGHTER BRUCE MILLSAP
WITH FIREFIGHTER CARL COOK
AS OF AUGUST 1983

Name	A. Raw Score 1/	B. Converted Score	C. Final Score	D. Rank on Register	E. BFRS Seniority (as of 8/83)	F. Highest Formal Station Assignment	G. Certified for Assistant Driver or Driver	H. Months as Medic or Leadworker (as of 8/83)	I. Shifts as Acting Officer (as of 8/83)	J. Educational Pay Incentive	K. Other Firefighting Experience
Bruce Millsap	196 2/	94.17	100.17	4	6	Nozzleman	July 1979	0	2 or 3	A.A.S. in Fire Science	--
Carl Cook	122 2/	73.61	81.61	85	9	Assistant Tillerman	--	0	0	--	--

1/ Total number of possible correct answers on the March 1983 fire lieutenant examination: 217.

2/ The probability of observing such a disparity in scores, if the true score of Millsap was within 4 standard errors of measurement of that of Cook, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Millsap exceeds the true score of Cook by at least 4 standard errors of measurement.

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BEST AVAILABLE COPY

CASE NUMBER: CV84-P-0903-S

DATE: DEC 16, 1985

PLAINTIFF'S EXHIBIT NUMBER 187

COMPARISON OF FIREFIGHTER JAMES HENSON
WITH FIREFIGHTER CARL COOK
AS OF AUGUST 1983

Name	A. Raw Score 1/	B. Converted Score	C. Final Score	D. Rank on Register	E. BFRS Seniority (as of 8/83)	F. Highest Formal Station Assignment	G. Certified for Assistant Driver or Driver	H. Months as Medic or Leadworker (as of 8/83)	I. Shifts as Acting Officer (as of 8/83)	J. Educational Pay Incentive	K. Other Firefighting Experience
James W. Henson	192 2/	93.06	99.06	6	6	Medic	June 1978	22	2	A.A.S. in Fire Science EMT III	Hillview Fire Department - 3 years, fire-fighter, captain deputy chief, and chief
Carl Cook	122 2/	73.61	81.61	85	9	Assistant Tillerman	--	0	0	--	--

1/ Total number of possible correct answers on the March 1983 fire lieutenant examination: 217.

2/ The probability of observing such a disparity in scores, if the true score of Henson was within 4 standard errors of measurement of that of Cook, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Henson exceeds the true score of Cook by at least 4 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 188

COMPARISON OF FIREFIGHTER JOHN GARVICH, JR.
WITH FIREFIGHTER CARL COOK
AS OF AUGUST 1983

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 8/83)	Highest Formal Station Assignment	Certified for Assistant Driver or Driver	Months as Medic or Leadworker (as of 8/83)	Shifts as Acting Officer (as of 8/83)	Educational Pay Incentive	Other Firefighting Experience
John Garvich, Jr.	182 2/	90.28	99.28	5	9	Nozzleman	July 1976	0	7	A.A.S. in Fire Science	Air National Guard Fire-fighter since 1979
Carl Cook	122 2/	73.61	81.61	85	9	Assistant Tillerman	--	0	0	--	--

1/ Total number of possible correct answers on the March 1983 fire lieutenant examination: 217.

2/ The probability of observing such a disparity in scores, if the true score of Garvich was within 4 standard errors of measurement of that of Cook, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Garvich exceeds the true score of Cook by at least 4 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 189

COMPARISON OF FIREFIGHTER BERNARD VON HAGEL
WITH FIREFIGHTER EUGENE BALDWIN
AS OF MAY 1985

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 5/85)	Highest Formal Station Assignment	Certified for Assistant Driver or Driver	Months as Medic or Leadworker (as of 5/85)	Shifts as Acting Officer (as of 5/85)	Educational Pay Incentive	Other Firefighting Experience
Bernard Von Hagel	147 2/	85.77	101.77	7	17	Leadworker	February 1974	101	At least 250	A.A.S. in Fire Science	--
Eugene Baldwin	108 2/	73.71	81.71	77	9	Backup Man	August 1984	0	0	--	--

1/ Total number of possible correct answers on the October 1984 fire lieutenant examination: 193.

2/ The probability of observing such a disparity in scores, if the true score of Von Hagel was within 2 standard errors of measurement of that of Baldwin, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Von Hagel exceeds the true score of Baldwin by at least 2 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 190

COMPARISON OF FIREFIGHTER BERNARD VON HAGEL
WITH FIREFIGHTER ALBERT ISAAC
AS OF MAY 1985

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 5/85)	Highest Formal Station Assignment	Certified for Assistant Driver or Driver	Months as Medic or Leadworker (as of 5/85)	Shifts as Acting Officer (as of 5/85)	Educational Pay Incentive	Other Firefighting Experience
Bernard Von Hagel	147 2/	85.77	101.77	7	17	Leadworker	February 1974	101	At least 250	A.A.S. in Fire Science	—
Albert Isaac	111 2/	74.64	80.64	80	7	Backup man	—	0	0	—	—

1/ Total number of possible correct answers on the October 1984 fire lieutenant examination: 193.

2/ The probability of observing such a disparity in scores, if the true score of Von Hagel was within 2 standard errors of measurement of that of Isaac, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Von Hagel exceeds the true score of Isaac by at least 2 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 192

COMPARISON OF FIREFIGHTER JOHN GARVICH, JR.
WITH FIREFIGHTER ALBERT ISAAC
AS OF MAY 1985

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 5/85)	Highest Formal Station Assignment	Certified for Assistant Driver or Driver	Months as Medic or Leadworker (as of 5/85)	Shifts as Acting Officer (as of 5/85)	Educational Pay Incentive	Other Firefighting Experience
John Garvich, Jr.	166 2/	91.65	101.65	8	11	Medic	July 1976	12	13	A.A.S. in Fire Science EMT III	Firefighter in Air National Guard since 1979
Albert Isaac	111 2/	74.64	80.64	80	7	Backup man	—	0	0	—	—

1/ Total number of possible correct answers on the October 1984 fire lieutenant examination: 193.

2/ The probability of observing such a disparity in scores, if the true score of Garvich was within 4 standard errors of measurement of that of Isaac, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Garvich exceeds the true score of Isaac by at least 4 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 193

COMPARISON OF FIREFIGHTER JOHN GARVICH, JR.
WITH FIREFIGHTER EUGENE BALDWIN
AS OF MAY 1985

Name	A. Raw Score 1/	B. Converted Score	C. Final Score	D. Rank on Register	E. BFRS Seniority (as of 5/85)	F. Highest Formal Station Assignment	G. Certified for Assistant Driver or Driver	H. Months as Medic or Leadworker (as of 5/85)	I. Shifts as Acting Officer (as of 5/85)	J. Educational Pay Incentive	K. Other Firefighting Experience
John Garvich, Jr.	166 2/	91.65	101.65	8	11	Medic	July 1976	12	13	A.A.S. in Fire Science EMT III	Firefighter in Air National Guard since 1979
Eugene Baldwin	108 2/	73.71	81.71	77	9	Backup man	August 1984	0	0	—	—

1/ Total number of possible correct answers on the October 1984 fire lieutenant examination: 193.

2/ The probability of observing such a disparity in scores, if the true score of Garvich was within 4 standard errors of measurement of that of Baldwin, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Garvich exceeds the true score of Baldwin by at least 4 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 194

COMPARISON OF FIREFIGHTER JOHN GARVICH, JR.
WITH FIREFIGHTER BENJAMIN GARRETT
AS OF JULY 1985

Name	A. Raw Score 1/	B. Converted Score	C. Final Score	D. Rank on Register	E. BFRS Seniority (as of 7/85)	F. Highest Formal Station Assignment	G. Certified for Assistant Driver or Driver	H. Months as Medic or Leadworker (as of 7/85)	I. Shifts as Acting Officer (as of 7/85)	J. Educational Pay Incentive	K. Other Firefighting Experience
John Garvich, Jr.	166 2/	91.65	101.65	8	11	Medic	July 1976	12	13	A.A.S. in Fire Science EMT III	Firefighter in Air National Guard since 1979
Benjamin Garrett	111 2/	74.64	77.64	87	3	Plugman	—	0	0	—	—

1/ Total number of possible correct answers on the October 1984 fire lieutenant examination: 193.

2/ The probability of observing such a disparity in scores, if the true score of Garvich was within 4 standard errors of measurement of that of Garrett, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Garvich exceeds the true score of Garrett by at least 4 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 195

COMPARISON OF FIRE LIEUTENANT EUGENE POPE
WITH FIRE LIEUTENANT TONY JACKSON
AS OF SEPTEMBER 1983

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 9/83)	Certified for Assistant Driver or Driver	Months as Fire Lieutenant (as of 9/83)	Shifts as Acting Captain (as of 9/83)	Educational Pay Incentive	Other Firefighting Experience
Eugene Pope	159	82.47	102.47	3	24	July 1959 September 1972	116	40	A.A.S. in Fire Science	--
Tony Jackson	129	70.78	77.78	28	6	August 1979	17	0	--	--

1/ Total number of possible correct answers on the August 1983 fire captain examination: 204.

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BEST AVAILABLE COPY

CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 196

COMPARISON OF FIRE LIEUTENANT MICHAEL MARTIN
WITH FIRE LIEUTENANT TONY JACKSON
AS OF SEPTEMBER 1983

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 9/83)	Certified for Assistant Driver or Driver	Months as Fire Lieutenant (as of 9/83)	Shifts as Acting Captain (as of 9/83)	Educational Pay Incentive	Other Firefighting Experience
Michael Martin	167 2/	85.58	102.58	2	17	--	93	0	A.A.S. in Fire Science	--
Tony Jackson	129 2/	70.78	77.78	28	6	August 1979	17	0	--	--

1/ Total number of possible correct answers on the August 1983 fire captain examination: 204.

2/ The probability of observing such a disparity in scores, if the true score of Martin was within 2 standard errors of measurement of that of Jackson , is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Martin exceeds the true score of Jackson by at least 2 standard errors of measurement.

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[PX 196]

CASE NUMBER: CV84-P-0903-S

DATE: DEC 16, 1985

PLAINTIFF'S EXHIBIT NUMBER 197

COMPARISON OF FIRE LIEUTENANT CHARLES CARLIN
WITH FIRE LIEUTENANT TONY JACKSON
AS OF SEPTEMBER 1983

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 9/83)	Certified for Assistant Driver or Driver	Months as Fire Lieutenant (as of 9/83)	Shifts as Acting Captain (as of 9/83)	Educational Pay Incentive	Other Firefighting Experience
Charles Carlin	157	81.69	100.69	4	19	April 1973	114	30	A.A.S. in Fire Science	--
Tony Jackson	129	70.78	77.78	28	6	August 1979	17	0	--	--

1/ Total number of possible correct answers on the August 1983 fire captain examination: 204.

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BEST AVAILABLE COPY

COMPARISON OF FIREFIGHTER FLOYD CLICK
WITH FIREFIGHTER WOODROW LASTER
AS OF MAY 1982

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 5/82)	Highest Formal Station Assignment	Certified for Assistant Driver or Driver	Months as Medic or Leadworker (as of 5/82)	Shifts as Acting Officer (as of 5/82)	Educational Pay Incentive	Other Firefighting Experience
Floyd Click	160 2/	89.64	102.64	2	13	Leadworker	July 1971	70	150	--	11 months as "Training Officer" of Shady Grove Volunteer Fire Department
Woodrow Laster	135 2/	77 36	82.36	107	5	Plugman	--	0	0	A.A.S. in Fire Science	--

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1/ Total number of possible correct answers on the January 1982 fire lieutenant examination: 210.

2/ The probability of observing such a disparity in scores, if the true score of Click was within 4 standard errors of measurement of that of W. Laster, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Click exceeds the true score of W. Laster by at least 4 standard errors of measurement.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

STIPULATION

IT IS STIPULATED AND AGREED, by and between the parties, through their respective counsel, that the deposition of **GORDON GRAHAM** may be taken before Gary N. Morgan, Registered Professional Reporter, Commissioner and Notary Public, State at Large, at 1500 Park Place Tower, Birmingham, Alabama, on the 20th day of August, 1985, commencing at 9:07 A.M.

* * *

[Page 41]

Q. (BY MS. MANN:) Mr. Graham, let me ask you to look at what's been marked as United States Exhibit Number 2 which is an eight-page document and ask you to identify that, please, sir.

A. This is a copy of executive order 35-81 dealing with affirmative action officer and affirmative action plan and a cover letter dated August 20, 1981 from the Mayor to department heads transmitting a copy of the executive order and announcing a department head meeting to discuss the attachment.

Q. Which portion, if any, of Exhibit Number 2 were you responsible for drafting?

A. I drafted the — the exhibit.

Q. When you say the exhibit, are you talking about all eight pages?

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A. Yes.

* * *

[Page 44]

Q. What was the source, if any, for the information that you put in the affirmative — the affirmative action plan that's attached as exhibit A?

A. Basically the — it's from the consent decree.

Q. Are there any provisions in the affirmative action plan that were taken from or reflect paragraph two of the consent decree?

A. No.

Q. Why aren't there any provisions that

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reflect paragraph two of the consent decree?

A. Paragraph two at that time was not an issue.

Q. When you say it was not an issue, what do you mean by that?

A. Just that it wasn't an item that was a critical item.

* * *

[Page 46]

Q. I believe your earlier testimony was that in August of 1981 paragraph two was not an issue, it was not a critical item. How has your understanding of paragraph two changed from August of 1981 to the present?

[Page 47]

A. My understanding hasn't changed.

Q. All right. Has the effect of paragraph two on the City's implementation of the consent decree changed from August of 1981 to the present?

MR. ALEXANDER: I object to the form. You can answer.

A. No.

Q. Has language from paragraph two been included in any affirmative action plan of any City department since 1981?

A. I don't recall any — any language. I think most of the departments have — it's — I see it's in the — the statement. It's on page three of the prototype plan, article three interim annual hiring goals subject to job openings occurring and availability of qualified applicants.

Q. All right. Now, which portion of that note do you — are you referring to when you say language from paragraph two?

A. I'm not saying that's from paragraph two.

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Q. Okay. I'm sorry.

A. I'm saying to my knowledge the only — to my knowledge, there's no statement in the department affirmative action plan referencing paragraph two, but this is a note that speaks to qualification of applicants.

Q. Why did you not think that paragraph two was a critical item when you drafted the prototype affirmative action plan?

A. Basically for the reasons that I have previously stated.

Q. And would you state them for me one more time?

A. It was a permissive paragraph put in to protect the City making it — stating that we would not be required to hire unnecessary people, people not qualified or those demonstrably less qualified according to some job-related selection procedure.

Q. When you say it was a permissive paragraph, what do you mean by that?

A. If the City, which it wouldn't, wanted to hire somebody it didn't need, it could

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do so.

Q. Was there anything else that the City could do, if it wanted to?

A. Under paragraph two?

Q. Yes, sir.

A. I would assume it could do any of those items listed under paragraph two.

Q. Which would be?

A. Hire unnecessary personnel, hire personnel that are not qualified, hire personnel that are demonstrably less qualified, based upon some job-related selection procedure.

* * *

[Page 61]

Q. Now, my question, Mr. Graham, if a department head does not select a female or a black who has been certified, it's my understanding that the department head then has to in writing explain why that person has not been selected, is that correct?

A. If it's in a job classification in a department where the long-term goal for blacks or females had not been met.

Q. Okay. In that setting, is it your understanding that the department head must establish in writing that the female or black was unqualified for the particular job as the reason for not selecting that person, or is there another standard that you apply?

MR. ATKINS: Object to the form.

[Page 62]

A. There is no standard as such other than the department head's assessment of that particular individual for that particular job.

Q. When you receive the written comments of the department head explaining why he or she has not selected a female or

black who has been certified for a particular job, and this is the situation where the long-term goals have not been met, what standard do you apply in determining whether or not to accept or reject their explanation for why this person wasn't chosen?

A. There is no standard other than to satisfy myself that there is sufficient reason not to appoint that individual.

* * *

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Q. (BY MS. MANN:) Are there any promotions within the City that you believe paragraph two has an impact on or affects?

MR. ATKINS: Object to form.

A. I don't know of any unnecessary personnel that we've hired. I don't know of any

[Page 140]

unqualified personnel that we've hired, and whatever the third part of that paragraph means, I'm not aware of any that we've hired.

Q. Mr. Graham, looking at the operations of the consent decree prospectively from this minute on, do you have an understanding as to whether or not paragraph two in any way impacts on or has an effect on promotional processes within the City?

MR. ATKINS: Object to form.

A. Nothing other than what I've already testified to.

Q. Do you have an understanding of the meaning of the term demonstrably as used in paragraph two?

A. No.

Q. Have you ever sought to ascertain what the term demonstrably means as used in paragraph two?

A. Sought to ascertain, no.

Q. Who is the person or persons within the City charged with enforcing the consent decree?

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A. Enforcing it? I assume the Court would enforce it.

Q. What person or persons within the City are charged with implementing the consent decree?

A. The Mayor is — would be primarily responsible. He's delegated certain aspects of the consent decree to me.

Q. What aspects of the consent decree has the Mayor delegated to you?

A. He's named me as affirmative action officer.

* * *

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Q. Let's go back to my Fire Lieutenant hypothetical and let's assume that we have no black Fire Lieutenants. You've gotten openings, no promotions have been made in 1985 and the fire department receives a certification and supplemental certification from the Personnel Board, and he finds — the Fire Chief finds all of the individuals certified to be minimally qualified for promotion to Fire Lieutenant, but he finds all of the whites on the certification — we have no blacks on the original certification. He finds all of the whites to be better qualified. What discretion does the department head have in determining how many of those promotions go to whites and how many go to blacks?

* * *

[Page 188]

A. The department head has full discretion as to what promotion decisions to make.

* * *

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Q. Would you have any objection to the department head choosing the ten whites over the blacks?

A. He's got all qualified candidates, there were no black Lieutenants, and he had an opportunity to promote blacks to Lieutenant, I would send that recommendation back to him to be reconsidered.

Q. And what would you ask him to

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reconsider it in light of? What factors should he reconsider it based on?

A. If he makes the same recommendation, provide additional information.

Q. And assume he does make the same recommendation and provides you with additional justification as to why he thinks all of the whites are better qualified and why all of the blacks are minimally qualified based on factors that you believe to be job related, would you then allow those promotions to be made?

A. Probably not.

Q. And why is that?

A. In my judgment, he would not have complied with the requirements of the consent decree.

Q. And which requirements would he have not complied with?

A. To attempt to promote qualified blacks where blacks are underrepresented.

Q. How many of those positions of the ten promotional openings would he have to fill with blacks for him, in your opinion, to meet

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the requirements of the consent decree?

A. In the fact situation you have described, five.

(Off-the-record discussion).

Q. Mr. Graham, what if — the same situation, the Fire Chief comes back to you after he initially says I find all ten whites to be better qualified based on job-related selection procedures, and he comes back and he says I have carefully reviewed the situation, and I've carefully reviewed the consent decree, and not only do I find all ten whites to be better qualified, but I find them to be demonstrably better qualified based on job-related selection procedures than all ten blacks who I find — or than all blacks that have been certified, would that additional justification, in your opinion, in any way change what you have described as the requirements of the consent decree?

A. No.

* * *

[Page 423]

Q. What criteria does the City expect its department heads to use in judging qualifications?

A. There are no formal criteria established. Department heads use their professional judgment.

Q. And the City has established no criteria for department heads to use in assessing qualifications of candidates certified

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for jobs with the City?

A. The wording of your question confuses me.

Q. Which part?

A. The City has not established any criteria for assessing candidate qualification.

Q. Do the department heads establish criteria for assessing qualifications of employees certified for jobs with the City?

A. Each department head satisfies in his or her mind what qualifications they want as openings occur.

Q. What criteria does Chief Gallant use in the fire service to assess qualifications of candidates certified for jobs in the fire service be they entry level or promotional?

A. I'm not certain what criteria he has established.

Q. Do you know if he has established any criteria?

A. No, other than to satisfy himself that people can do the job.

Q. Have you ever discussed with Chief

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Gallant whether he uses any criteria in assessing qualifications of persons certified for entry level or promotional positions in the fire service?

A. No.

Q. Has the City or the fire service attempted to validate the use of any criteria in the fire service of assessing qualifications?

A. On promotions?

Q. On promotions.

A. Not that I'm aware of.

Q. Have you ever advised a department head that the criteria they use in assessing qualifications should be validated?

A. No.

* * *

[Page 439]

Q. Why wasn't the relative qualification proviso of paragraph two included in executive order 35-81 for the prototype affirmative action plan?

* * *

[Page 440]

A. At that time, paragraph two wasn't an issue.

* * *

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Q. Why wasn't that language provided or included in executive order 35-81 or the

[Page 442]

prototype affirmative action plan?

A. It wasn't necessary.

Q. Who determined that it wasn't necessary?

A. I don't know that anyone determined that it wasn't necessary. It just was not included.

* * *

[Page 458]

Q. Does the City decree provide that after a period of six years the decree will be dissolved?

[Page 459]

MR. ALEXANDER: Again, I object to the form. You can answer.

A. As I understand it, there is a provision where any party to the decree can move to have it dissolved.

Q. If someone stated that the decree would dissolve after six years, would that be an accurate statement?

A. It could be.

Q. Will the decree automatically dissolve after six years?

A. I don't know.

Q. Under what circumstances would a statement that the decree would dissolve after six years be an accurate statement?

A. Only that the decree basically is for a six-year term.

Q. Do you expect the decree to be dissolved after a six-year term?

A. I don't know.

Q. You don't have any judgment whatsoever about that?

A. No.

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Q. Is my statement correct, you have no judgment?

A. As to whether the decree will be dissolved after six years?

Q. Yes, sir.

* * *

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Q. Okay. Does the City decree provide that the City is permitted to promote a less qualified individual in preference to a better

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qualified individual to a Fire Lieutenant position?

MR. ALEXANDER: Object to the form. You can answer.

A. The City would be permitted to do so, yes.

Q. Which provisions of the decree so permit the City?

A. It would be the paragraphs five, six, seven, eight, nine.

Q. Can you be any more specific than that, sir?

A. Those paragraphs speak to goals for appointing qualified candidates.

Q. And is it your interpretation of the City decree and understanding of the City decree that those paragraphs permit the City to promote a less qualified individual in preference to a better qualified individual to a Fire Lieutenant position?

A. As long as the individual is qualified, they can be promoted under the decree.

* * *

[Page 475]

Q. Are Fire Lieutenant promotees traditionally drawn from the ranks of fire fighter?

A. Yes.

* * *

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Q. Okay. Are some promotional slots reserved for blacks?

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A. Only that limited number specifically referenced in the decree.

Q. Then it's your understanding that with respect to the Fire Captain position there was one Fire Captain position that was specifically reserved for a black?

A. Not a particular position, but a position once a qualified black was available.

Q. And no white had the opportunity to be considered for that particular position?

A. A vacant Captain position for which there was a qualified black available, then a white would not have been considered for that.

* * *

[Page 516]

Q. Does the City consider paragraph two in attempting to comply with the goal provisions of the City decree?

A. Not to my knowledge.

Q. You ignore it?

[Page 517]

A. It's never been at issue in filling jobs.

Q. It's ignored?

A. I wouldn't say it's ignored, it's not an issue in — has not been an issue in filling jobs.

Q. It has not been considered?

A. It's known, it's there.

Q. It's not implemented?

A. I don't know there's anything to implement about the paragraph two.

Q. It's a limitation on the goal provisions, isn't it?

MR. ALEXANDER: Object to the form. You can answer.

A. No.

* * *

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Q. (BY MR. FITZPATRICK:) The City of Birmingham acting through Chief Gallant with respect to Fire Lieutenant and Fire Captain promotions uses no test or any other type of

[Page 525]

selection procedure to determine or measure the relative qualifications of individuals certified for fire officer positions, is that correct?

A. Yes.

Q. And the City is unable to determine relative qualifications of candidates certified for fire officer positions, is that the City position?

MR. ALEXANDER: Object to form. Go ahead.

A. Is unable to?

Q. Yes.

A. I don't know that we've ever attempted to. I don't know if we would be able to do that or not, not having done it.

* * *

RESOLUTION
547-81

WHEREAS, there are presently pending in the United States District Court for the Northern District of Alabama three law suits commenced in 1974 and 1975 by the United States and others against the City of Birmingham and others; and,

WHEREAS, said law suits allege discriminatory practices by the City of Birmingham, Jefferson County and other County municipalities, and the County Personnel Board in employment opportunities afforded by all said entities to Blacks and women on account of race or gender in violation of Title VII, Civil Rights Act of 1964 and other Federal statutes; and,

WHEREAS, the City Attorney and other Counsel representing the City advise the Council that the interests of the City would best be served by the negotiation of a settlement of the cases with the United States and the private plaintiffs as opposed to continuing the litigation the result of which would, in great likelihood, subject the City to financial liabilities considerably in excess of the amounts for which the cases can be settled; and,

WHEREAS, accordingly, counsel for the City, having engaged in lengthy settlement negotiations with the United States and the private parties plaintiff, now advise the Council that the parties have reached substantial agreement on the content of a Consent Decree for submission to the Court for its approval; and,

WHEREAS, the City Attorney and other counsel representing the City are of the opinion and so advise the Mayor and Council that the proposed settlement is both fair and reasonable and the entry by the City into a Consent Decree embodying such settlement terms is far preferable to and eminently more advantageous for the City than the certain alternative of years of trial and appellate court proceedings the ultimate outcome of which will almost certainly obligate the City to the payment of sums substantially in excess of those proposed in settlement.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Birmingham that the City Attorney, upon the concurrence of the Mayor, be and is hereby authorized for and on behalf of the City to enter into a Consent Decree in Civil Action cases numbered 75-P-0666-S, 74-Z-17-S, and 74-Z-12-S presently pending before the Honorable Sam C. Pointer, Jr. in the United States District Court for the Northern District of Alabama.

[U.S. EXHIBIT 3]

ORDINANCE NO. 77-88

AN ORDINANCE TO AMEND DIVISION 4 OF CHAPTER 2 OF THE GENERAL CODE OF THE CITY OF BIRMINGHAM 1964 ENTITLED "FAIR HIRING."

BE IT ORDAINED by the Council of the City of Birmingham that Division 4 of Chapter 2 of the General Code of the City of Birmingham, 1964 be hereby amended to read as follows:

(a) In order to assure fair hiring practices by the City of Birmingham, it is the policy of the City to recruit, hire, and promote to all job classifications in its various departments and agencies without regard to race, color, religion, sex, national origin, or physical handicap, except where sex is a bona fide occupational qualification, or the physical handicap is such as to interfere materially or render impossible reasonable performance in the job to be filled. The City of Birmingham is committed to developing and expanding positive programs which will assure the strengthening of this policy.

(b) Each head of a department or agency of the City of Birmingham shall be responsible for establishing and maintaining effective means of recruiting, hiring, training, transferring, retaining and promoting employees in order to prohibit any discriminatory practice, either intentional or inadvertent, with respect to race, color, religion, sex, national origin, or physical handicap.

(c) On or before January 1, 1978, and no later than January 1 of each of the succeeding five years and at such other times as may be required by the City Council of the City of Birmingham, the head of each department of the City shall submit to the Office of the Mayor, in writing, an affirmative action plan designed to increase the employment and promotions of blacks in the respective department, and to otherwise promote the policies of this section. A copy of said plan, with such modification as may be required by

the Mayor, shall be filed with the City Clerk within thirty (30) days of receipt thereof by the Mayor. The plan shall set forth the affirmative steps to be taken to increase the employment and upgrading of blacks, and any others with respect to whom there is any indication of the possibility of discrimination; it shall include specific goals for black manpower utilization and time tables for achievement of these goals. In determining the goals for black manpower utilization, the percentage of blacks in the work force in the City of Birmingham shall be a primary consideration. Further, the plan shall not be based on, or result in, the discharge of any employee of any department or agency of the City of Birmingham.

(d) A copy of the affirmative action plan for each department, when approved by the Mayor, shall be posted in a conspicuous and prominent place in the main office of each department of the City of Birmingham and at the office of the Jefferson County Personnel Board, and a copy thereof shall be open to reasonable public inspection in the office of the Mayor during regular business hours.

(e) Each department of the City of Birmingham shall maintain records indicating the race and sex of each person employed in each job classification in the department, and the job classifications in which handicapped persons are employed. Such records shall be made available for public inspection upon request at reasonable times. These records shall be embodied in semi-annual and annual evaluation reports of each department's affirmative action plan as of June 30 and December 31 of each year, to be submitted by each department head to the Mayor and the City Council on or before July 31 and January 31 of each calendar year. This report shall also include a review of the department's progress in achieving the specific goals of the department's affirmative action plan, noting those goals which were achieved and those not yet achieved, the reason for any failure to achieve goals, and the remedial action being taken to overcome any such failure. Copies of these evaluation reports shall be maintained for a period of five years in the Mayor's Office, where they shall be

subject to reasonable public inspection during regular office hours.

(f) With regard to the formulation and execution of the affirmative action plans and programs provided for herein, the Mayor shall promulgate, and modify from time to time, such rules and regulations as he shall deem necessary to carry out the policies of this section; provided, however, that such rules and regulations shall include the following minimum provisions together with such other provisions as may from time to time be required.

(1) Whenever the percentage of classified City employees who are black is less than the percentage of black employees in the labor force in the City as defined in *Manpower Information for Affirmative Action Programs*, published by the Alabama Department of Industrial Relations, for July 1, 1976 each department head shall, as vacancies occur, give first preference to any blacks certified by the Jefferson County Personnel Board as being qualified to fill such vacancies until such time as the above stated goal has been reached.

(2) So long as any department has failed to achieve the goals established in its approved plan, the rejection of any such certified black applicant shall be required by such rules and regulations to be justified in writing, and a copy of such written rejection justification shall be maintained in a separate file in the Office of the Mayor, and subject to reasonable public inspection during regular office hours for a period of not less than two years.

(3) Each department of the City shall, separately or in conjunction with other departments, have a positive recruiting program in cooperation with community organizations, area high schools, colleges and universities, and with local business and industry to increase the utilization of persons protected from discrimination by this section.

(4) A complaint procedure which shall be available to any applicant or employee who has reason to

believe that he or she has been discriminated against in violation of the provisions of this section which procedure shall provide, on request, a fair hearing, a written decision, and a right of appeal to the Mayor, provided further that no provision of this section or rules or regulations issued hereunder shall require the placing of any person in any job for which he or she is not qualified by reason of ability, training or experience.

(g) So much of any ordinance heretofore adopted as is inconsistent with the provisions hereof is hereby repealed.

[Adopted by the Council of the City of Birmingham
at its meeting held on May 3, 1977 and
approved by the Mayor on May 9, 1977.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

STIPULATION

IT IS STIPULATED AND AGREED, by and between the parties, through their respective counsel, that the deposition of **RICHARD ARRINGTON, JR.** may be taken before Gary N. Morgan, Registered Professional Reporter, Commissioner and Notary Public, State at Large, at 1400 Park Place Tower, Birmingham, Alabama, on the 16th day of September, 1985, commencing at 9:18 a.m.

* * *

[Page 66]

Q. Mayor, what was your involvement, if any, in the negotiations of the City decree?

A. Well, I had no direct involvement. My — it was negotiated by my attorneys, the attorneys for the City of Birmingham. They advised me and made recommendations to me which

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I passed judgment on.

Q. Do you recall having seen any proposed drafts of the City decree prior to the final decree that was ultimately signed and entered by the court?

[PX 403 & DX 2236]

A. I don't recall seeing drafts. I do recall having discussions with the attorneys regarding the contents or proposed contents of the consent decree settlement.

Q. Did you ever attend any of the negotiations sessions between the City and the Department of Justice concerning the consent decree?

A. No.

Q. Did you ever make any recommendations concerning specific provisions that should be included or excluded in the City decree?

A. I don't recall making any.

Q. Do you recall ever making any written comments concerning the City decree prior to its being signed?

A. I don't recall any.

Q. All right. Did you have any

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discussions with any of the lawyers for the Department of Justice concerning the City decree prior to its being signed?

A. No, I did not.

Q. What was the approval process that was required before Mr. Baker could sign the City decree on behalf of the City?

A. It was necessary for the Birmingham City Council to authorize him to do so.

Q. Was your approval as Mayor also required?

A. As a matter of law or legal procedure, it was not required, but as — I certainly had sat in on the meeting with the council and the attorneys when the decree or the proposed decree was explained.

* * *

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attached to yours. As Mayor, did you approve of the City's signing this consent decree?

A. Are you asking me did I take some specific action to approve it or did I — was I in favor of it?

Q. Were you in favor of it?

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A. Yes.

Q. Did you review the decree prior to the City Council's authorizing the City to enter into the decree?

A. I reviewed it with my attorneys. I do not know if I read through the entire decree, but I had the attorneys go over the terms of the decree and explain it to me.

* * *

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Q. At the time those suits were filed, did you have any opinion as to whether or not there was any merit to those complaints?

A. Could you sort of refresh my memory on what the complaints are so that we are on the same wave length here?

Q. Okay. Sure. I'll represent to you that in 1974 there were two suits filed against the City by private entities or individuals and then in 1975 a third suit filed by the United States Government against the City and others, and when a suit is filed, one files a complaint or a charge or a claim, written claim making certain allegations. Do you understand tha? [sic]

A. I understand that, yes.

Q. Okay. After the filing of these three suits, did you have any opinion as to the merits of the charges in those three suits against the City?

A. I'm sorry. You didn't understand my question.

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MR. ALEXANDER: He wants to know what the charges were.

A. The charges —

Q. Oh, charges of racial discrimination against the City in its employment practices.

MR. WORTHEN: Race and sex.

Q. Race and sex?

A. Did I have a opinion as to that?

Q. Yes.

A. Yes, I had an opinion as to that.

Q. What was that, sir?

A. That the City practiced race and probably sex discrimination, but racial discrimination rather flagrantly.

Q. That the City was guilty, so to speak?

A. That was my opinion. I wouldn't use the term guilty as a legal court thing, but the City had —

Q. In a layman's term.

A. Okay. Yes.

Q. Okay. Did you express that opinion to any of your fellow council members?

A. Not as it related to any specific

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complaint. However, I expressed the opinion that the City was discriminating in its employment practices in council meetings when discussions came up and by other actions I took such as trying to introduce ordinances and perhaps even raising — by questions I raised and debates I participated in.

Q. Who does the City Attorney represent, the Mayor or the council of the City or all of the above.

A. All of the above.

Q. If the City Attorney in response to a suit against the City takes a position or files an answer to the suit, does the City Attorney review the suit with the council before taking that position or filing that answer?

A. He may or may not. The City Attorney like all other department heads are under the supervision of the Mayor. The council has no authority under the Mayor/Council Act to instruct department heads or City employees.

Q. As I understand it, unless the council affirmatively speaks to its position on

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a given issue, the Mayor instructs the City Attorney on what the position of the City shall be in litigation?

A. That could be the case. It just depends on what — what the case is.

* * *

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[Q. . . . Why was the council consulted prior to the City's entering into the consent decree?

A. Because as elected officials, I number one wanted the council to be consulted as elected representatives. Secondly, in authorizing payments, appropriations of funds, the council is the body that has to appropriate funds. Those are two of the basic reasons.

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Q. But the main reason that council approval was sought because you needed their authorization for the funds?

A. No, I — that is just one of the reasons. They were also parties to this by virtue of the fact that they were council members. I saw them as, you know, parties to it as official representatives of the City, governing body — in a sense when the City was sued, the governing body.

Q. The individual council members in their official capacities were not named, were they?

A. I do not recall.

Q. Assume for me, please, that the City had reached an understanding with the United States and the Martin plaintiffs and the third entity which signed the decree, the Ensley Branch, but instead of providing for two hundred and sixty-five thousand dollars in back pay — rather than monetary relief, the decree instead provided for the payment of a thousand dollars; you have authority to pay out a thousand dollars

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without council approval, do you not?

A. Yes.

Q. Assume for me that the consent decree was negotiated. Would you have had authority to authorize the settlement based on the injunctive relief in the consent decree plus the payment of, say, a thousand dollars, something within your limit?

MR. ALEXANDER: Object to the form of the question. Answer if you can.

A. I don't know. I would have — I would have to consult the attorneys on it. All I know is that I was advised, consulted the City Attorney — I mean City Council and all.

Q. What I'm trying to find out is if you had the authority to commit the City to injunctary [sic] relief without seeking council approval in the settlement of litigation?

A. No.

Q. And you may or may not know the answer.

A. I don't know the answer.

Q. Was the main concern of the council

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at the meeting in your office prior to the City's entering into the consent decree the amount of money that would be committed to the settlement?

A. I really don't recall. I thought it was such a modest amount. I thought it was the best business deal we had ever struck, but I just don't recall.

Q. Why do you think it was the best business deal you had ever struck?

A. I just thought paying two hundred and sixty thousand dollars for a City that had a history of discrimination against people was a very modest price to pay.

Q. And in addition, you gained tools to upgrade blacks and women in the work force?

A. In the consent decree?

Q. Yes, sir.

A. Yes, we did.

Q. So you believe you not only got off with a low but also gained tools to achieve certain goals that you wanted to achieve in office?

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MR. ALEXANDER: Object to the form. You can answer.

A. No, that's not exactly correct, but at least a move toward a goal that I would like to see this city achieve.

Q. And without the decree, you don't believe you would have been able to attain those goals?

A. Absolutely not.

Q. So you certainly didn't mind committing the City to be the subject of that injunction, did you?

MR. ALEXANDER: Object to the form. You can answer.

A. I'm sorry. I get a little confused. Subject of the injunction —

Q. Is the City of —

A. — to enjoin the City from —

Q. Enjoin the City to the relief of the decree?

A. I agree with that. I did not object to it in any event if that is the question.

Q. In approving the decree, was it the

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council's position that it did not want an admission of guilt by the City?

A. I don't recall that ever being a position that was expressed by the council. I just think that's been a position that all of us as elected officials have generally taken in matters of litigation, and that is more or less standard even in ordinances which I probably sponsored myself.

Q. We'll settle, but we are not going to admit that we're liable for anything?

A. I don't know. There's some legal posturing that I don't fully understand.

Q. Has the City Council of Birmingham ever made a finding of past discrimination by the City in its employment practices?

MR. ALEXANDER: Object to the form. You can answer.

MR. FITZPATRICK: Which aspect of the form if I can —

MR. ALEXANDER: Finding of past discrimination, I think those are legal phases [sic] of art which you are directing to a lay witness.

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I don't think the question is proper. I'm not certain he understands it. If he does, he can answer.

Q. Do you understand the term "finding of past discrimination"?

A. I think I understand the question, but I don't know the answer to it except to say I do not know.

Q. You're not aware of any findings of past discrimination made by the City Council with respect to the past employment practices of this City?

A. As a body, no.

Q. Okay. How about by individual council members?

A. Well, I think my — some of my studies and some of my findings would at least satisfy me and perhaps some other council that such practices did exist, but they were never formalized, formally adopted by the council.

Q. The council has never formally studied them and adopted them?

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A. They never adopted them anyway.

Q. Now, in the matter of the — I don't quite know what to call it — the minority contractors ordinance, is that a correct term?

A. I know what you're talking about.

Q. Okay. What's the correct term?

A. That's — that's it, yeah.

Q. In the matter of the minority — when the council adopted the minority contractors ordinance, did it attempt to make findings of past discrimination at that time? With respect to the City's allocation of business contracts?

A. I do not know. It seems to me that was done during David Vann's administration, and I don't know what findings were made at that time. I don't recall any.

Q. Other than the ordinances of the City Council and the minutes of the City Council, are there any other records which reflect the conduct of affairs of the council or decisions of the council or findings of the council?

A. Those are the only records I would know of.

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Q. So findings of discrimination — of the past discrimination with respect to employment practices are not reflected in any ordinance or the minutes of the council, then they are not recorded anywhere, to your knowledge?

A. Aside from court records where I think the findings were made, I don't think there are any.

* * *

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Q. Are you familiar with the two trials that were presented to Judge Pointer in the course of the Jefferson County — the United States v. Jefferson County litigation?

A. I am not sure. Can you be a bit more specific? I have to have a little bit more.

Q. I'll try if counsel will bear with me. We talked earlier about three discrimination suits that were filed against the City in '74 and '75. And if we may, can we call that the original litigation?

A. All right.

Q. And are you aware that those three cases were consolidated by Judge Pointer in 1975 or '76?

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A. Yes.

Q. Okay. So we'll just call those three cases the three original — the original litigation. Are you aware that there were — that two trials were conducted during the course of the original litigation?

A. No, I'm aware that there was a hearing and I suppose maybe a trial where Judge Pointer ruled on the validity of some examinations.

Q. Okay. That was the first trial?

A. And then I am aware that there was apparently a hearing which was — had gone at the time — prior to the time the consent decree was entered into but which may have been aborted or stopped because of the consent decree.

Q. I believe you testified that you are aware of the first trial in which the validity of certain Personnel Board examinations was tried?

A. I do remember that one tried, yes.

Q. And did that trial involve the validity of certain administrations of the

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police officer and fire fighter exam?

A. I don't know.

Q. Do you know if that trial involved just the police officer and fire fighter exam?

A. I don't know.

Q. Do you know what findings Judge Pointer made after that trial, the first trial?

A. I generally know that there was a requirement from the Judge that dealt with validation, a requirement of validation for some examinations that were being used by the Personnel Board.

Q. What is your understanding of the term "validation"?

A. To make valid, prove the relevance of.

Q. Prove the relevance of the examination?

A. Yes, prove the purpose for which it purports to serve.

Q. In the case of police officer exam to make the exam correspond to the goal of trying to measure one's capabilities of being a police officer?

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A. That's — would be my interpretation.

Q. And it's your understanding that Judge Pointer required the Personnel Board to validate its exam?

A. That's my general impression, yes.

Q. Do you know what findings he made with respect to the exams administered by the Personnel Board?

A. I don't recall a specific finding. I sometime ago read an order from the Judge relating to that matter and one which I think are related to a second hearing.

Q. We'll come to that in a moment, sir. What findings did the Judge make after the first trial about the employment practices of the City of Birmingham?

A. I don't recall specifically the findings. I do generally recall that there were some requirements about certifications that must be made in which the Judge set forth certain requirements as related to certification of blacks, whites and things of that — of that sort.

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Q. The Judge required the Personnel Board to meet certain certification requirements?

A. That's my recollection.

Q. Did he require anything of the City?

A. I don't — I don't recall whether he did or not.

Q. Did he make any findings of intentional discrimination by the Personnel Board?

A. At what time?

Q. After the first trial.

MR. ALEXANDER: Object to the form. You can answer.

A. I don't know.

Q. Do you know what I mean by intentional discrimination?

A. I think I do, yes.

Q. Okay. What is that? What is your definition of the term?

A. Discriminating on purpose.

Q. Purposeful discrimination?

A. Yes, yes.

Q. Do you know if he made any findings

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of purposeful discrimination?

A. I don't know. It's been some time since I've read that order.

Q. Do you know if he determined that the Personnel Board had not engaged in purposeful discrimination?

A. I don't know. What sticks out in my mind is some of the statements — or a statement in the Judge's order in which he strongly implies if he does not state that the City — the evidence indicated that the City had liabilities in that area. Whether that was following the first one or the second one, I don't know. Possibly it was the second one, because I think he was addressing the matter that we were about to enter into the consent decree, that the parties had decided to have an out-of-court settlement.

Q. Have we covered the extent of your knowledge about the findings the Judge made after the first trial?

A. At least my recollection at this time, yes, without reviewing the document again, yes.

* * *

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Q. Yeah. Are you aware of any court records or court decision where a court has found that the City of Birmingham has engaged in intentional discrimination against blacks?

A. No, I'm not aware of it.

Q. Okay. Are you aware of any court records or court decisions or determinations

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where any court has found that the City of Birmingham has engaged in any discrimination against blacks?

A. No, I'm not aware of it.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal #81-7761

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JEFFERSON COUNTY, *et al.*, *Defendants-Appellees.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs-Appellees,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants-Appellees.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs-Appellees,* v. GEORGE SEIBELS, *et al.*, *Defendants-Appellees.* BIRMINGHAM FIREFIGHTERS ASSOCIATION 117, *et al.*, *Proposed Intervenors, Appellants.*	CIVIL ACTION NO. CV 74-Z-12-S

On Appeal from U.S. District Court for the Northern District of Alabama, Southern Division

BRIEF OF DEFENDANT-APPELLEE
CITY OF BIRMINGHAM

[PX _____]

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* * *

STATEMENT OF ISSUES ON APPEAL

1. Whether the district court abused its discretion in denying a labor organization's motion to intervene to challenge consent decrees terminating seven years of fair employment litigation where the labor organization had no contractual relationship with the employer.

2. Whether appellants have standing to challenge consent decree provisions governing hiring and employment requirements when such provisions do not affect appellants.

3. Whether the district court abused its discretion in approving the consent decrees as (i) fair, adequate, and reasonable, and neither (ii) illegal or unconstitutional.

STATEMENT OF THE CASE

For the convenience of the Court, the City of Birmingham adopts by reference the statement of the case in the Department of Justice brief.

SUMMARY OF THE ARGUMENT

Appellants' intervention attempt is untimely since the Firefighters failed to seek to intervene until this litigation had been pending for seven years. Under the *Stallworth v. Monsanto Co.*, guidelines it is clear that the trial court did not abuse its discretion in denying intervention. Appellants delayed many years after they knew, or should have known, of an interest in the lawsuit, placing a heavy burden on the union to jus-

tify intervention. Moreover, the exsisting [sic] parties to the litigation will suffer significant prejudice if intervention is allowed; in contrast, the Firefighters have made no showing of a judically-cognizable [sic] interest, much less prejudice.

With respect to hiring goals and requirements, the union lacks standing either in its own right or as the representative of its members. As the union failed to demonstrate it was adversely affected, it lacks standing in its own right. Likewise, the Firefighters' failure to show a sufficient and direct injury to its members prevents it from obtaining standing as the representative of its members.

A critical fact, with respect to both the union's request for intervention and the underlying merits, is the absence of a collective bargaining relationship between Birmingham and the Firefighters. As appellants concede: "In Alabama, public employee[s] do not have collective bargaining rights." [Appellants' Br. at 37]. Thus, the right of these appellants to participate as parties in this litigation is tenuous.

The limited goals in the Birmingham decree represent a permissible remedy. In examining this comprehensive settlement of these actions this Court should not be unmindful of the circumstances surrounding settlement. A careful and experienced district judge found:

> Employment statistics for Birmingham's police and fire departments as of July 21, 1981, certainly lend support to the claim made in this litigation against the City--that, notwithstanding this Court's directions in 1977 with respect to certifications by the Personnel Board for the entry-level police officer and firefighters positions and despite the City's adoption of "fair hiring ordinance" and of affirmative action plans, the effects of past discrimination against blacks persist. . . . In the fire department, 42 of the 453 firefighters are black and none of the 140 lieutenants, captains, and battalion chiefs are black.

(R.I., 317)

The challenged promotional and hiring goals fairly address this problem. The promotional goals in the decree are supported by the fact that discriminatory tests largely excluded blacks from

the fire department for a period of time. The goals are temporary and do not altogether exclude whites even in the temporary period during which they operate. Significantly, Birmingham is not required to promote any unqualified candidate under the precise terms of its decree. Therefore, the Firefighters have failed to demonstrate that the trial judge abused his discretion in approving the consent decrees.

STATEMENT OF JURISDICTION

Jurisdiction exists, *inter alia,* under 42 U.S.C. 2000e et seq.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE FIREFIGHTERS' MOTION TO INTERVENE

Plaintiffs contend that the trial court abused its discretion under F.R.Civ.P. 24 when it denied the Firefighters' Motion to Intervene as untimely. The linchpin of appellants' argument is their characterization of their request for intervention as one "of right" under F.R.Civ.P. 24(a).

A. Intervention Under Sections (a) and (b) of Rule 24

In the district court, appellants failed to characterize their proposed intervention as "permissive" or as of "right." Judge Pointer in his order simply stated that the motion was "clearly untimely" (R.I., 320). Retrospectively, however, appellants claim they were entitled to intervene under F.R. Civ. P. 24(a)(2). (Appellants' Br. at pp. 8, 12).

Several courts have enunciated a policy against private intervention under Rule 24(a)(2) in government enforcement litigation brought under Section 707 of Title VII. *U.S. v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975); *EEOC v. United Air Lines*, 515 F.2d 946 (7th Cir. 1975); *U.S. v. San Diego County*, 20 FEP Cases 1425 (S.D. Cal. 1977). [1]

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1 Although attorneys for the Department of Justice have taken the lead role in this litigation, Judge Pointer's August 18, 1981 Order and Judgment also covered two private cases consolidated for trial with 75-P-0666-S; *Ensley Branch of N.A.A.C.P., et al., v. Seibels, et al.*, CA 74-2-12-J; *John W. Martin, et al., v. City of Birmingham, et al.*, CA 74-2-17-S.

These courts reason that private intervention is inappropriate in Section 707 pattern and practice suits which are brought to remedy widely based systemic discrimination. In *U.S. v. Allegheny-Ludlum, supra*, the Fifth Circuit upheld the trial court's denial of an application to intervene by the National Organization for Women ("NOW") made after a consent decree was entered in an action brought against nine steel companies alleging pattern and practice employment discrimination. Analyzing NOW's motion to intervene under Rule 24(a)(2), the Court of Appeals held that, although NOW obviously claimed an interest in the subject matter of the action, it failed to satisfy the other two prongs of the test for non-statutory intervention of right. In so ruling, the Fifth Circuit distinguished NOW's position from that of the union in *EEOC v. American Tel. & Tel. Co.*, 365 F. Supp. 1105, *aff'd in part, appeals dismissed in part*, 506 F.2d 735 (3rd Cir. 1974), *consent decrees upheld* 556 F.2d 167 (3rd Cir. 1977) stating, "At any rate, we think a labor union *which is a party to collective bargaining agreement* represents a far stronger case for intervention than does an organization such as NOW." *U.S. v. Allegheny-Ludlum, supra* at p. 845 (emphasis added). The court distinguished NOW from a labor union administering a collective bargaining agreement stating:

> A labor union is elected to represent in collective bargaining the employees who depend on the company for their jobs and livelihood. When the company, as in *American Tel. & Tel.*, enters into a settlement with the government in an effort to resolve complaints of alleged employment discrimination, the union derivatively acquires a mandatory duty to negotiate alternatives to the provisions - *e.g.*, those relating to seniority or as in the Bell case pregnancy leave - of the existing collective bargaining contract. As the settlement contains features the legality or propriety of which is questionable, then the union may have a definite, cognizable interest qua union in contesting these features. Cf. Kilberg, *Current Civil Rights Problems in Collective Bargaining Process: The Bethlehem and AT&T Experiences*, 27 Vand. L. Rev. 81, 101, 106 (1974). Furthermore, the union's ability to protect its interest may well be impaired or impeded if it is not allowed to intervene in the settlement formalization proceedings. At the very least, it would be anomalous to assume in such cases that the employees' bargaining representative's interest is adequately served by the government or the employer.

Id.

Because of limitations dictated by Alabama law, discussed *infra*, the Firefighters posture is analogous to NOW.

Similarly, in *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977), an employment discrimination suit by blacks in which non-union white employees sought to intervene to contest the provisions of a consent order, the Fifth Circuit stated, "[S]hould the district court determine that no contract exists between the appellants and Monsanto, their interest in the case would not meet the challenge posted by *Donaldson*, and they would not be entitled to intervene as of right." *Id.* at p. 269. Thus, if no contractual relationship exists between the employees and the employer, the employees are not entitled to intervene as of right. Therefore, the question of whether the non-union white employees should be granted leave to intervene was addressed under permissive intervention standards.

These considerations are equally applicable to this case. Appellants acknowledge that Alabama public employees do not have collective bargaining rights. The Firefighters have no legitimate interest adversely affected because none of the goals proposed in the consent decree infringe upon contractually-secured employment rights. Thus, the Firefighters do not enjoy an unconditional right to intervene under F.R. Civ. P. 24(a)(2). Appellants' intervention status is correctly analyzed under the standards for permissive invention.

Even though the timeliness requirement applies to both forms of intervention a different standard is used to determine what is "timely," depending on the type of intervention sought. Not surprisingly, permissive intervention timeliness questions are judged by a more stringent standard. *E.g.*,*McDonald v. E.J. Lavino*, 430 F.2d 1065, 1073 (5th Cir. 1971), quoting Barron & Holtzoff (Wright ed.); *Diaz v. Southern Drilling Corp*, 427 F.2d 1118, 1126 (5th Cir. 1970). Thus, appellants here

face a difficult task in proving their motion to intervene was timely under F.R. Civ. P. 24(b).

B. Appellants' Motion to Intervene Is Not Timely

Rule 24 fails to define "timely," and the Advisory Committee Note furnishes no clarification. However, as recognized by the Supreme Court in *NAACP v. New York*, 413 U.S. 345 (1973):

> Whether intervention be claimed of right or as permissive, it is at once apparent from the initial words of both Rule 24(a) and Rule 24(b), that the application must be "timely." If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which this suit has progressed is one factor in determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

NAACP v. New York, supra at pp. 365-66 (1973). *Accord, United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977).

Thus, "Timeliness is not a word of exactitude or of precisely measureable dimensions." *McDonald v. E.J. Lavino Co., supra.* Moreover, applying *NAACP v. New York*, timeliness is not limited to chronological considerations but is determined from all the circumstances. *U.S. v. U.S. Steel Corp*, 548 F.2d 1232, 1235 (5th Cir. 1977); *Stallworth v. Monsanto Co., supra.*

The Fifth Circuit in *Stallworth* formulated specific guidelines to inform trial courts in the exercise of their discretion. Four factors must be considered in passing on the timeliness of a petition for leave to intervene:

> (1) The length of time during which the would-be intervenor actually knew or should have known of this interest in the case before he petitioned for leave to intervene. *United Airlines, Inc. v. McDonald, supra*; *SEC v. Tipco, Inc.*, 554 F.2d 710, 711 (5th Cir. 1977); *McDonald v. E.J. Lavino Co., supra*; *Diaz v. Southern Drilling Corp., supra.*
>
> (2) The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case. *United Airlines, Inc. v. McDonald, supra*; *McDonald v. E.J. Lavino Co., supra*; *Diaz v. Southern Drilling Corp., supra.*
>
> (3) The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied. *Moten v. Bricklayers International Union*, 543 F.2d at 228 (D.C. Cir. 1976); *see, McDonald v. E.J. Lavino, supra*; *Diaz v. Southern Drilling Corp., supra.*
>
> (4) The existance of unusual circumstances militating either for or against a determination that the application is timely. *NAACP v. New York, supra.*

Appellants argue that intervention was not untimely in that they acted diligently to intervene once they became aware they might be aversely affected. (Appellants' Br. at p. 14). However, application of the *Stallworth* criteria demonstrates that Judge Pointer did not abuse his discretion in holding that appellants' motion to intervene was not timely.

(1) The length of time during which the would-be intervenor actually knew or should have known of his interest in the case before he petitioned for leave to intervene.

With respect to the first factor Judge Pointer noted that at the time of the motion, this litigation had been pending for over five years and had been vigorously contested by the existing parties through two trials and one appeal. (R.I., 321).

Moreover, long before the contents of the proposed consent decrees were disclosed, appellants must have known their interests might be affected. Whether the litigation terminated in settlement or decision, it was apparent that in fashioning a remedy, the interests of non-minority employees seeking the same jobs might be affected. Numerous courts have held intervention untimely under similar circumstances. See, *Commonwealth of Pa. v. Rizzo*, 530 F.2d 501 (3d Cir. 1976); *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980); *Stallworth v. Monsan-*

to, supra; *Dennison v. City of Los Angeles*, 658 F.2d 694 (9th Cir. 1981); *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir. 1978); *EEOC v. ET & WNC Transp. Co.*, 81 F.R.D. 371 (W.D. Tenn. 1978); *Firebird Society, Inc. v. New Haven Board of Fire Commissioners*, 66 F.R.D. 457 (D. Conn. 1975), *aff'd* 515 F.2d 504, *cert. den.* 423 U.S. 867 (1975).

In *Commonwealth of Pa. v. Rizzo, supra*, the Third Circuit Court of Appeals held that the trial court did not abuse its discretion when it ruled untimely the attempted F.R. Civ. P. 24(a)(2) intervention by the Fire Officers Union and white firefighters in an action challenging employment practices when the motion to intervene was filed after the entry of a final order. In *Rizzo*, as in this case, the white firefighters argued that, until shortly before they moved to intervene, they reasonably believed that their interests were being protected. Moreover, they claimed that their interests were not even implicated because they had understood that promotion practices were not at issue. In response to these arguments the Third Circuit noted that the white firefighters could not reasonably claim that they were unaware of the action and that the nature of the remedies sought by plaintiffs should have prompted intervention. Noting that the complaint, by its terms, addressed the whole spectrum of employment practices in the fire department and that extensive publicity about the litigation gave early notice of its potential impact on the firefighters rights, the Third Circuit found no abuse of discretion in the district court's denial of intervention.

Likewise, the First Circuit Court of Appeals in *Culbreath v. Dukakis, supra*, upheld the district court's denial of intervention. With respect to the length of time the intervenor knew or should have known of his interest before petitioning to intervene, the First Circuit held there was no excuse for the employee union's failure to intervene earlier in an employment discrimination action against the state nearly four years after they should have known of the initiation of the action and shortly before the parties to the action agreed on a consent decree containing racial preference mechanisms. As the court stated,

> While knowledge of the suit is not necessarily knowledge of one's interest, in this instance, the existence of interest

> was obvious. See, *Stallworth v. Monsanto Co.*, 558 F.2d at 264, and the only lack related to its extent, a matter of degree, not of kind. The complaint, the newspaper stories and the published court decisions all stated that the purpose of the suit was to force each agency to adopt hiring and promotion policies that would result in employed minorities and percentages approximately equal to their proportion of the population of the City of Boston. It should have been apparent to the unions that some non-minorities would be passed over in favor of minorities to achieve this goal.

Culbreath v. Dukakis, supra at p. 1592.

Thus, the First Circuit held that the trial judge had ample grounds for finding that the union should have known of their interest in the suit long before they filed their motion to intervene.

In *Dennison v. City of Los Angeles, supra*, the appellate court rejected the union's contention that it was not notified of the employees' action until shortly before the fairness hearing noting that the union had sufficient opportunity to intervene in the action prior to entry of the consent decree. Moreover, the court held that the union was provided with an opportunity to present to the trial court its view of the adverse impact on the decree of non-minority employees at the fairness hearing.

Finally, the Ninth Circuit in *Alaniz v. Tillie Lewis Foods, supra*, upheld the trial judge's denial of intervention under Rule 24(a) where the crux of the putative intervenor's argument was that they did not know that the settlement decree would be to their detriment. The court reasoned that surely the appellants knew the risk; therefore, they should have joined the negotiation before the suit was settled.

Contrary to the appellants' argument that they were not aware that "relief which could possibly be granted under Title VII could adversely affect them in greater degrees in the event the existing defendant decided to settle the case" (Appellants' Br. at p. 17), these cases establish that where there is no allegation that the litigation or its progress was fraudulently concealed

from potential intervenors, the nature of the relief sought should have alerted potential intervenors to the necessity for intervention. The record does not suggest fraudulent concealment.

Likewise, appellants' claim, even if correct, that their intervention was timely because they relied on the Personnel Board to defend the action and resist imposition of hiring and promotional goals (Appellants' Br. at p. 13) does not succeed. As noted by the Fifth Circuit in *U.S. v. U.S. Steel, supra* at pp. 1235-36:

> [T]he Union's reliance was misplaced . . . Even were we to accept the union's argument as explaining the delay, prejudice to the parties would still persist because, as the union concedes, it was aware of the consent decree from the first yet slept on its rights and took no action to assert its interest.

A similar response was made by the Third Circuit in *Commonwealth of Pa. v. Rizzo, supra*, to the union and white firefighters assertion that they were "lulled into non-action" by misrepresentations that the city would virgorously defend the case. The Third Circuit noted that the burden of establishing inadequate representation was on the proposed intervenor.[2] Thus, the court rejected the union's contention that intervention was timely and that any delay should be excused due to their reliance on misrepresentations concerning the adequacy and vigor of representation by the City of Philadelphia. *See also, EEOC v. Westinghouse Elec. Corp.*, ___ F.2d ___, 28 FEP Cases 815 (8th Cir. 1982) (per curiam) (burden on intervenor to demonstrate lack of knowledge). Similarly, intervention by the Firefighters in this case is untimely and may not be excused because of their assertion that they were allegedly relying on the original defendants to defend their interest. Thus, on this basis the courts have held intervention untimely where it occurs in such latter stages of litigation.

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2 Furthermore, the court held that a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee. *Commonwealth v. Rizzo, supra*, at p. 283. *See also*, 7A C. Wright & A. Miller, Federal Practice and Procedure § 1209 at 528-29 (1982); *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (196) (dictum).

Simply put, the Firefighters made an election to defend their interests by proxy. They cannot now complain because the result displeases them. Having sat on their hands for seven years, the Firefighters now have no right to contest the outcome of the fray.

(2) The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenors' failure to apply.

It should be initially noted that consideration of the second factor is only relevant to permissive intervention under Section (b) of Rule 24.[3]

Under *Stallworth v. Monsanto Co., supra*, the next relevant inquiry is "how much prejudice would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case." *Id.* at p. 267. As to the prejudice which the resultant delay might cause to other parties, the Third Circuit in *Commonwealth v. Rizzo, supra*, adopted the district court's opinion:

> To allow intervention at this stage of the case would result in serious prejudice to the rights of the plaintiffs and the Philadelphia Fire Department. Extensive discovery has been undertaken and completed, all critical issues have been resolved, and a final Order has been entered. The interest in basic fairness to the parties and expeditious administration of justice mandates the denial of the motion to intervene. *Id.* at p. 284.

Likewise, to permit intervention would result in further unfair and unjustified delays and possible denial of the relief which all the parties agreed to in the settlement agreement. *Firebird Society, Inc. v. New Haven Board of Fire Commissioners, supra; Culbreath v. Dukakis, supra; Commonwealth v. Rizzo,*

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3 As noted by the court in *Stallworth*, since a similar provision is not included in Section (a) of the Rule providing for intervention of right, it is apparent that prejudice to the existing parties other than that caused by the would-be intervenor's failure to act promptly is not a factor meant to be considered where intervention is of right.

supra; *Alaniz v. Tillie Lewis Foods*, *supra*; *U.S. v. Allegheny-Ludlum Industries*, *supra*.

In this case, the Firefighters would compel Birmingham to continue to litigate a suit it has negotiated to conclusion. The parties here have waited approximately seven years since commencing suit for resolution of the issues. Likewise, the parties have bargained in good faith in the belief that ultimately they could economically and fairly resolve this potentially divisive lawsuit. However, belated intervention for the purpose of challenging the consent decree will jeopardize months of difficult negotiation, and postpone full implementation. Indeed, the Firefighters' objection, if followed through to its logical conclusion, would dictate that the City of Birmingham either confess judgment, abdicating any hope of limiting the financial impact and fashioning injunctive relief, or litigate to a conclusion, incurring staggering legal expenses with the unhappy prospect of paying both its own lawyers and the lawyers for potential prevailing private plaintiffs. Neither the Constitution nor any law requires such a dilemma. Indeed, the federal policy of encouraging voluntary resolution of employment discrimination litigation suggests that such a dilemma is not intended.

(3) Prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.

With respect to the third factor, the essence of this requirement is "whether the union received such notice and opportunity to be heard as to satisfy the due process rights to be accorded persons so situated." *Culbreath v. Dukakis*, *supra* at p. 1593. See generally, *Hansberry v. Lee*, 311 U.S. 32, 43 (1940); *NAACP v. New York*, *supra*. Here the district court noted that it had reviewed the provisions of the proposed settlements to which objections had been raised and found the settlement to represent a fair, adequate and reasonable compromise of the issues between the parties. (R.J., 320). Moreover, the court stated that it not only permitted the Firefighters to be heard in opposition to the settlement but that it fully considered their objections. (R.I., 321). Thus, the prejudice to the intervenors from denial of intervention is minimal.

Likewise, despite appellants' contentions to the contrary (Appellants' Br. at p. 20) they were not denied an opportunity to be heard. Indeed, the Firefighters were allowed to present their arguments in opposition to the consent decree and based on its analysis of all the evidence, including the Firefighters' objections, the district court upheld the consent decrees. Thus, the appellants were not deprived of an opportunity to be heard as required by the due process clause. The Firefighters' suggestions that an evidentiary hearing was required to rule on its intervention petition is spurious in view of the consideration of their objections.

In *Culbreath v. Dukakis*, *supra*, the court similarly denied a motion to intervene on the ground that the intervenor's rights had been adequately represented in that the trial court had considered the potential objections, determined the settlement was fair, adequate and reasonable and not unlawful and that the plaintiffs enjoyed a substantial probability of success on the merits. Thus, the appeals court found that only a slight possibility of prejudice might flow to the union from a denial of intervention.

(4) The existence of unusual circumstances militating either for or against a determination that the application is timely.

With respect to the fourth factor regarding time limits, there are no unusual circumstances militating for intervention.

(5) Intervention was appropriately denied.

Analysis of the four factors which must be considered in passing on the timeliness of a motion to intervene indicates that the trial court did not abuse its discretion in denying intervention. The passage of many years from the time the union should have known of its interest in the case places a heavy burden on the union to make a strong showing justifying intervention. *Moten v. Bricklayer's International Union*, *supra* at p. 228; *Commonwealth of Pa. v. Rizzo*, *supra* at p. 501. The existing parties to the litigation have demonstrated they will suffer significant prejudice if intervention is allowed at this late date, while the Firefighters have made no showing of substantial prejudice which is likely to result from denial of intervention.

The trial court's decision to deny intervention has not been shown to have been an abuse of discretion.

II. THE FIREFIGHTERS DO NOT HAVE STANDING TO CONTEST CONSENT DECREE PROVISIONS WHICH DO NOT AFFECT THEIR MEMBERSHIP

The Firefighters lack standing to contest hiring goals and requirements. An association may obtain standing to seek judicial relief from injury to itself or as the representative of its members, even in the absence of injury to itself. *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Warth v. Seldin*, 422 U.S. 490 (1975); *Hunt v. Washington State Apple Adv. Comm.*, 432 U.S. 333 (1977). Obviously, the Firefighters lack standing with respect to the consent decrees [sic] effect on employees of other departments. *U.S. v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980); *aff'd in part and vacated and remanded in part*, 664 F.2d 435, (5th Cir. 1981) (en banc). However, the Firefighters have also failed to assert any facts or averments demonstrating that it has standing in either capacity with respect to the provisions of the consent decree governing the hiring of both blacks and women for the fire department.

In *Warth v. Seldin* the Supreme Court established that in order to obtain standing as a representative of its members, an association must satisfy the following criteria:

> The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members . . .

422 U.S. at p. 511.

Based on these criteria the Firefighters' union has failed to demonstrate that it has standing to assert the rights of its members. Although the Firefighters object to entry level requirements and hiring goals, obviously the Firefighters lack standing with respect to entry level jobs in that the union's members are already employees of the city. Furthermore, with respect to the promotional goals the Firefighters fail to show a sufficient direct and personal injury to its members. To the extent blacks belong to the Firefighters union, there are likely antagonistic interests in any event.

Likewise, with respect to the union's standing on its own behalf, it has alleged no facts indicating how the union has suffered, or will suffer, any injury in fact. The Supreme Court in *Sierra Club* stated that "'A mere interest in a problem', no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected'". *Sierra Club*, 405 U.S. 739. The Firefighters simply have failed to meet that standard by demonstrating a sufficiently direct injury to confer standing. As noted *infra*, the Firefighters' Association has no contractual rights to protect; thus, the Firefighters [sic] situation is distinguishable from that of the unions in *City of Miami*, *supra*; and *EEOC v. AT&T*, *supra*, who were held to have standing because of the effect of affirmative action provisions in the consent decrees on contractual seniority provisions. Furthermore, as one trial court observed:

> Where, as here, however, both those promoted and those "passed over" are members of the Union, it is difficult to say with certainty that the Union has the personal stake and interest sufficient to assure that concrete adverseness required by Article VII of the Constitution.

Germann v. Kipp, 14 F.E.P. Cases 1197, 1200 (W.D. Mo. 1977).

The appellant organization, therefore, fails to meet the requirement that a party seeking review must allege facts showing that he has been adversely affected.

III. IN ALABAMA PUBLIC EMPLOYEES DO NOT HAVE COLLECTIVE BARGAINING RIGHTS AND, ACCORDINGLY, THE FIREFIGHTERS HAVE NO RIGHTS AFFECTED BY THE CONSENT DECREES

Under Alabama law a public employer cannot enter into a valid labor contract with a labor organization concerning

wages, hours, and conditions of employment in the absence of express constitutional or statutory authority to do so. *Nichols v. Bolding*, 291 Ala. 50, 277 So. 2d 868, (1973); *Int'l Union of Operating Engineers v. Water Works Board*, 276 Ala. 462, 163 So. 2d 619 (1964). There is no Alabama statute authorizing public employers to contract with a labor organization. In 1977 the Legislature of Alabama enacted *Code of Alabama, 1975*, § 11-43-143 which provides:

> (a) No person shall accept or hold any commission or employment as a fire fighter or fireman in the service of the state or of any municipality in the state who participates in any strike or asserts the right to strike against the state or any municipality of the state, or be a member of an organization of employees that asserts the right to strike against the state or any municipality in the state knowing that such organization asserts such right.
>
> (b) All fire fighters serving the state or any municipality in the state either as paid firemen or as volunter [sic] fire fighters who comply with the provisions of this section are assured the right and freedom of association, self-organization and the right to join or to continue as members of any employee or labor organization which complies with this section, and shall have the right to present proposals relative to salaries and other conditions of employment by representatives of their own choosing. No such person shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion compel or attempt to compel any fire fighter or fireman to join or refrain from joining a labor organization. (Acts 1967, No. 229, p. 598.)

Thus, although the law of Alabama does not limit the right of firefighters to organize labor unions and present proposals relative to salaries and other conditions of employment, the Supreme Court of Alabama in *Nichols v. Bolding*, *supra* at p. 56, held that there is nothing in the statute which would indicate that the Legislature intended to require public officials to negotiate with the Firefighters' union or that the Legislature intended to grant public employees collective bargaining rights.

Indeed, appellants concede that, "In Alabama, public employees do not have collective bargaining rights." [Appellants' Br. at p. 37] Thus, the Firefighters acknowledge that by virtue of law, public employees in Alabama cannot enter into a labor contract.

Furthermore, the numerous cases relied on by the appellants with respect to limitations on quotas and goals are inapplicable. As none of the subjects of the proposed consent decree was a matter of contract with the union, the union here does not occupy the same position as was the case in *U.S. v. City of Miami* which speaks only to the propriety of goals and quotas in the context of the non-concurrence of a union which was a *party* to the litigation *and* had a collective bargaining agreement. The absence of impaired contractual rights, therefore, provides an unambiguous distinction between this case and *City of Miami* 664 F.2d at 447 (. . . "we are not prepared to hold that the consent decree is valid insofar as it deprives the FOP and its members of the benefit of the promotion procedure that was in effect a part of the FOP contract with the City.").[4] Rather, *U.S. v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980) controls the present litigation. The Fifth Circuit's *Miami* analysis on rehearing focused on the fact that the consent decree involved affected the F.O.P.'s contract with the city and that under Florida law, when a subject is encompassed within the terms of existing contract, a public employer may not foreclose bargaining on the subject or unilaterally alter the terms and conditions of employment. Thus, *City of Miami* is inapposite to this appeal and does not govern the judicial approval of proposed settlements in contexts other than that of a proposed

---

4 In his opinion below, Judge Pointer correctly noted in response to the Firefighters' contention that after *City of Miami* no changes in the Civil Service rules should be approved without its consent as a union: "The point however is that--unlike the situation in the *City of Miami* case — none of the rules to be altered under the proposed consent is a matter of contract with the union. Rather, the case of *sub juidice* [sic] is like that involved in the *City of Alexandria*, a decision left intact when rehearing was granted in the *City of Miami* decision one may reasonably assume that en banc rehearing was granted to reconsider the consequences upon a proposed settlement of non-concurrence of a union which was party to collective bargain [sic] rules and not for the purpose of reconsidering the basic rules governing judicial approval of proposed settlements." (R.I, 319)

consent decree which affects matters of contract with a union with a collective bargaining agreement.

No collective bargaining rights of the Firefighters are affected by the challenged decrees under Alabama law. Therefore, proposed intervenors do not possess contractual rights as were abridged in *City of Miami* thus requiring union participation in that case. Therefore, the applicable standard governing judicial approval of proposed settlements is that established in *City of Alexandria*.[5]

* * *

---

5 Furthermore, it should be noted that under ***Bonner v. Pritchard***, 661 F.2d 1206 (11th Cir. 1981) the en banc decision in *City of Miami* is not binding as precedent on the Eleventh Circuit, in that the Eleventh Circuit stated in ***Bonner*** that decisions of the Fifth Circuit as that court existed on September 30, 1981, handed down by that court prior to close of business on that date, would be binding as precedent on the Eleventh Circuit, but the court reserved for future consideration the effect on Eleventh Circuit law of decisions handed down by the former Fifth after September 30, 1981 in cases submitted to that court for decesion [sic] before October 1 and possible future en banc decisions by the old Fifth changing what appeared to have been its rule as of September 30, 1981. As the *City of Miami* en banc decision was not handed down until December 3, 1981, it falls into this latter category of cases.

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Nos. 87-1614, 87-1639, 87-1668

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

JOHN W. MARTIN, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Volume III

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* These items are not formally in the record, and are included over the objection of Respondents' Wilks, *et al.* They are included by Petitioners on the basis that the district court on at least three occasions took judicial notice of the record in *United States v. Jefferson County*, the litigation that resulted in the consent decrees. *See* J.A. 54, 111, 186.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ENSLEY BRANCH OF THE N.A.A.C.P., *Plaintiff*, v. GEORGE SEIBELS, *et al.*, *Defendants*.	CIVIL ACTION NO. CA 74-Z-12-S
JOHN W. MARTIN, *et al.*, *Plaintiffs*, v. CITY OF BIRMINGHAM, *et al.*, *Defendants*.	CIVIL ACTION NO. CA 74-Z-17-S
UNITED STATES OF AMERICA, *Plaintiff*, v. JEFFERSON COUNTY, *et al.*, *Defendants*.	CIVIL ACTION NO. CA 75-P-0666-S
LUCY WALKER, *et al.*, *Plaintiffs*, v. JEFFERSON COUNTY H[illegible]ME, *et al.*, *Defendants*.	CIVIL ACTION NO. CA 76-M-2047-S

January 10, 1977

Memorandum of Opinion

POINTER, D.J.: Since 1945 the Personnel Board of Jefferson County has been charged under state law with the duty of periodically administering examinations to "fairly test the

relative capacity and fitness" of applicants for positions with local governmental agencies.[1] 1940 Ala. Code Appx. §§ 645, *et seq.* (Recomp. 1958). Those who pass are ranked on an eligibility list in the order of their exam scores.[2] As vacancies occur, the three persons then at the top of the list are certified to the employing agency for final selection, the appointments being probationary in nature for the first twelve months.[3] An applicant's name may be removed from the eligibility list after having three times been certified and refused employment.

This litigation challenges the employment practices of the governmental agencies as discriminatory on the basis of race, color, and sex, and includes an attack upon the examinations administered by the Personnel Board. Presently at issue, following a trial held December 20-22, 1976, are the tests currently used to screen applicants for positions as police officers, deputy sheriffs,[4] and firefighters.[5]

An attack upon the police and firefighters exams is certainly understandable when one considers that, although the relevant labor pool is over 25% black, yet on June 30, 1976, only 56 (or 6.5%) of the 860 police officers were black and only 9 (or 1.4%) of the 630 firefighters were black. These statistics may, however, be misleading for purposes of this lawsuit because they include the historical results of hiring practices employed long before passage of the Equal Employment Op-

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1 Fourteen separate county and municipal employers are covered by the law. Cities with a population of under 5,000 are excluded.

2 With multiple vacancies, the number of persons certified is two more than the number of vacancies to be filled.

3 Not presently at issue are requirements (such as age or education) which may be imposed as conditions to taking an examination, nor are specifications (such as residence within Jefferson County) which may give preference to certain applicants.

4 Unless otherwise noted, reference to police officers in the balance of this opinion will also refer to deputy sheriffs.

5 Under F.R.Civ.P. Rule 42, the four actions were consolidated with respect to challenges to Personnel Board tests and a separate trial was scheduled respecting the attacks on the Policeman 10-C, Firefighter 20-B, and Office Worker 30-B tests. At the trial the plaintiffs indicated that the attack on the Office Worker 30-B test was dropped for lack of evidence of adverse impact and that any attack on the 10-C and 20-B tests based on sex was likewise dropped for lack of evidence.

portunity Act of 1972 or, indeed, before utilization of the tests under scrutiny at this time.

The principal focus should rather be upon the events of more recent years, with particular attention upon practices subsequent to March 24, 1972, when Title VII of the Civil Rights Act of 1964 was made applicable to the Personnel Board and the governmental agencies which it serves. Likewise, information as to the general labor pool in the area is of only marginal importance when one has, as we do, extensive data as to actual applicants for positions and there is no evidence that minority applications have been depressed by prior employment practices.

Adoption of the Current Tests

In late 1965, following an independent study as to why no blacks were then employed as police officers in the City of Birmingham, the Personnel Board decided to replace its police and firefighter exams with tests developed by the Public Personnel Association, now known as the International Personnel Management Association. IPMA tests were being widely used in other parts of the country and were considered by the Board as superior to other tests then available. The change was part of a multi-faceted program intended to increase black participation in governmental positions. (See Appendix C to X-342). Policeman Test 10-C and Firefighter Test 20-B have been in use since August 18, 1967, and October 23, 1968, respectively, as the screening examinations for these positions under the state-mandated selection procedure,[6] although at times other tests have been administered for experimental purposes or for validation studies. Since April 10, 1974, a modified scoring key (based upon only 80 of the 120 test items) has been employed in grading the 10-C test for purposes of the eligibility list. This modification was made at the recommendation of qualified independent consultants who, after study, concluded that the scoring change would increase validity of the test for black applicants.

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6 The 10-C and 20-B tests were adopted by the Board after initially experimenting, commencing in January 1966, with alternate forms of the IPMA tests.

Intent

It is clear that the Personnel Board, in performing its functions as an employment agency for the various local governments, has not intentionally discriminated against blacks. Indeed, at least since 1965, the Board has not only sought to provide non-discriminatory opportunities for black applicants, but also attempted, within the limits of its statutory duties, to rectify the racial imbalances in local government employment. Some mention of these aims and efforts is appropriate.

It was the Board's hope that adoption of the tests now in issue would benefit black applicants, while nevertheless providing a fair "test of the relative capacity and fitness" of all applicants, as required by state law. Immediately, a study was undertaken to ascertain whether the IPMA policeman test, although a paper and pencil test, would correlate positively and significantly with a widely used non-verbal performance test of general intelligence, the Revised Beta Examination— and it did. As successful applicants were employed by the city of Birmingham, were trained at the police academy, and entered performance of their duties, information was incorporated into the Board's on-going validation studies—which, while lacking sufficient blacks in the sample (only 6 in the 10-C sample) to permit full analysis, were considered by the Board as justifying further usage of the 10-C.[7] These studies are presented by the Board not as satisfying the requirements of the EEOC or Department of Justice guidelines on tests, but rather as indicating its efforts to see that its examinations were fair predictors of job performance even at a time when it was not subject to the provisions of Title VII. As already noted, when, in 1974, it was advised by independent consultants that a modification of the scoring of the 10-C exam would improve the validity for black applicants, it immediately put that change into effect.

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7 The Board's studies resulted in selection of the 10-C form because of its significant and positive correlation with a greater number of the selected criteria measures than did the alternate IPMA form. The study indicated a significant and positive correlation between 10-C scores and training academy average (as well as several course grades in the academy) and between the training academy average and the officers' latest efficiency ratings.

Since 1965 the Board, with the cooperation of local civic groups and some of the employing agencies, has been actively engaged in recruitment efforts to attract black applicants. In 1966 it began assuming the $10.00 medical examination costs for newly hired persons; and in 1967 it was successful in sponsoring legislation to eliminate the $1.50 examination fee previously required and to eliminate the priority previously given applicants who resided within an employing agency's jurisdiction.[8] It has experimented with a lowering of the raw score used to measure a "passing" grade on the exams where it could justify that approach on the basis of "supply" and "demand".

In short, in its selection, administration and use of the 10-C and 20-B tests, there has been no design or intent on the part of the Board to discriminate on the basis of race or color. However, the standard under Title VII of the Civil Rights Act of 1964 is not so limited[9]—rather, if the *operational effect* of test usage is to discriminate against blacks, then it is proscribed unless it is shown to be a "job related" requirement,[10] with a "manifest relation to the employment in question."[11] See U.S.C.A. § 2000e-2(h). In this inquiry the court is to follow the guidelines adopted by the EEOC and, more recently (November 17, 1976), by the Department of Justice (DOJ), absent some "cogent reason."[12] See *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (CA5 1976). Also instructive are the 1974

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8 Not until 1968 was the residency requirement of the City of Birmingham removed by the city ordinance. A Jefferson County preference remains in effect, but this can hardly disadvantage blacks, who constitute a larger portion of the Jefferson County population than of neighboring counties.

9 An intent to discriminate would presumably be required for there to be a violation of 42 U.S.C. § 1983, if not of 42 U.S.C. § 1981. See *Washington v. Davis*,.—U.S.—(June 7, 1976).

10 *Albermarle Paper Co. v. Moody*, [9 EPD ¶ 10,230] 422 U.S. 405, 425 (1975).

11 *Griggs v. Duke Power Co.*, [3 EPD ¶ 8137] 401 U.S. 424, 432 (1971).

12 There are some conflicts between the EEOC and the DOJ Guidelines. However, it is not necessary as to the issues presently before the court that a choice be made between the two.

A.P.A. Standards for Educational & Psychological Tests and the 1975 Principles for the Validation and Use of Personnel Selection Procedures of the A.P.A.'s Division 14.

Adverse Impact

Where the total selection process has an adverse impact upon a substantial racial group in the labor market, the individual components of that process—such as a screening test—are also to be evaluated for adverse impact. DOJ Guidelines § 4b. For purpose of this two-step analysis, data can be extracted from the evidence pertaining to administrations of the 10-C and 20-B tests which have been used for employment decisions after March 24, 1972:[13]

	10-C		20-B	
	Black	White	Black	White
Failing test	395	191	216	267
Passing test	373	1,762	69	1,263
Hired	51	455	9	215

According to the DOJ Guidelines, § 4b, "A selection rate for any racial *** group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact ***. Greater differences in selection rate would not necessarily be

13 Information for this table has been taken from X-11 and from data respecting hires supplied by the parties at the court's request following formal close of the evidence. Certain caveats should be noted: The results of the 10-C exam administered on April 29-30, 1971, have been eliminated because it was not used for employment decisions after March 24, 1972. The results of the 10-C exam administered on September 30 and October 1, 1971 and of the 20-B exam administered on May 26-27, 1971, have been included in the tabulation, even though in part the eligibility lists taken therefrom would have been used prior to March 24, 1972. The number of hires includes those hired in 1972 prior to March 24, 1972. As the Board points out, the number of hires is affected by voluntary choices of the candidates (such as declining job offers or waiving consideration), but, lacking reliable data on such matters for both whites and blacks, the court has looked to actual hires as the measure of the overall selection ratios. Finally, it should be noted that, since persons are permitted to take exams more than once, the applicant figures do not completely accurately reflect the number of different individuals involved. These limitations do not, in the court's opinion, prevent meaningful usage of the data for the purposes indicated.

regarded as constituting adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority *** candidates to be atypical of the normal pool of applicants from that group."

So far as the total selection process is concerned, one finds from the above data that the hiring rate for blacks (6.6% of the black applicants on 10-C and 3.2% of the black applicants on 20-B) are substantially less than eighty percent of the hiring rates for whites (23.3% and 14.1%, respectively). These greater differences in selection rates cannot be explained on the basis of inadequate numbers and, according to the court's calculations, are statistically significant: the ϕ coefficient for the 10-C test is .193 and for the 20-B is .121, both of which are significant at $\rho < .001$.

Looking at the data pertinent to the test component of the selection process, one finds again that the pass rates for blacks (48.6% for 10-C and 24.2% for 20-B) are substantially less than eighty percent of the pass rates for whites (90.2% and 82.5%, respectively). And again, according to the court's calculations, these greater differences in pass rates, which are based upon samples of adequate size, are statistically significant: the ϕ coefficient for the 10-C test is .46 and for the 20-B is .48, both being significant at $\rho < .001$. Also of importance is the fact that, of the blacks who did pass the tests, 85.4% placed in the lower half of the initial eligibility lists for police officers and 89.9% placed in the lower half of the firefighter lists.[14]

Some concern can justifiably be expressed that the special recruiting efforts undertaken by the Personnel Board and other groups to attract black applicants—while commendable as an affirmative action to overcome racial imbalance in the police and

14 These figures are derived from X-12 and are subject to the appropriate caveats indicated in fn. 13, *supra*. Moreover, X-12 does not have any information for one eligibility list and does not contain percentile information as to several lists. In a very real sense, "passing" an exam is measured not by obtaining a derived score of at least 70 (and thereby being entered on the eligibility list), but by obtaining a score sufficiently high to be placed on the eligibility list at a position where, during use of that list, the candidate will actually be certified to an employing agency.

firefighter forces—may at the same time have resulted in an atypical pool of blacks taking the test, producing distortion in the test performances of the black applicants. For example, the black applicants may have included many who were not seriously interested or motivated with respect to the jobs in question, thereby affecting their test performances. Absent, however, any hard data to support such an hypothesis or to indicate its magnitude, the court, impressed with the substantial differences in hire rates and pass rates for the two racial groups, must conclude that the overall selection procedures in effect since March 24, 1972, and as a component part thereof the tests used for those purposes, have had an adverse impact on blacks.

Validation Studies

According to EEOC Guidelines § 1607.3, "the use of any test which adversely affects hiring *** of classes protected by Title VII constitutes discrimination unless (a) the test has been validated and evidences a high degree of utility as hereinafter described ***." For the purpose of making such validation studies of its many tests, the Board in 1972 contracted with Drs. William E. Farrar and William A. McLaurin, Professors in the Psychology Department of the University of Alabama at Birmingham. Both had experience with personnel selection procedures in public employment systems. Priority, but not exclusive attention, was to be given to the police and firefighter tests, and their work on these tests began in late 1972. Their studies respecting the two tests continued even to the time of trial, with various reports being made in each of the years 1973, 1974, 1975 and 1976. That their work was not complete before trial does not suggest inattention; rather, it is indicative that their studies were intended to be thorough and were directed to numerous tests.[15]

15 Until a couple of months prior to trial, the litigation was being prepared with the anticipation that all tests under challenge were to be considered at a single hearing. When the decision was made by the court that the first trial would only concern the 10-C, 20-B, and 30-B tests, counsel and witnesses were freed to shift their attention to "loose-ends" on these three tests.

Psychometric Analyses

The 10-C and 20-B tests are paper-and-pencil instruments, each consisting of 120 multiple choice items.[16] The initial concern of Drs. Farrar and McLaurin was directed to the reliability,[17] item difficulty,[18] and item discrimination[19] of the tests. The following findings were made:

	reliability		items satisfactorily difficult	items satisfactorily discriminating
	r_{sp}	r_{kr}		
10-C total (N=479)	.95	.95	88	116
10-C black (N=176)	.90	.90	77	106
10-C white (N=303)	.95	.93	70	115
20-B total (N=507)	.92	.91	64	115
20-B black (N=108)	.85	.85	61	66
20-B white (N=399)	.86	.86	53	108

16 Some items on each test elicit knowledge which apparently would be needed for performance of job functions; others do not. Some effort has been made by the test developer to give "face validity", as by expressing an item involving numerical problem solving in the context of information with which job occupants would be dealing. Face validity does not affect validity for usage as a selection procedure so much as it may overcome motivational resistance by those taking the test.

17 "Reliability refers to the consistency of scores obtained by the same persons when reexamined on the same test on different occasions, or with different sets of equivalent items, or under other variable examining conditions." Anastasi, PSYCHOLOGICAL TESTING, p. 103 (4th Ed. 1976). The methods used in this study to estimate reliability were the split-half technique (corrected by the Spearman-Brown prophecy formula) and the Kuder-Richardson formula 20.

18 A test item correctly answered by too high a proportion of the applicants is considered not difficult enough; correctly answered by too low a proportion, it is considered too difficult. In this study items correctly answered by 30% to 70% of the applicants were considered satisfactorily difficult.

19 Item "discrimination" is in essence a comparison between scores made on an individual test item and scores made on the total test, thereby ascertaining whether particular items "discriminate" significantly in predicting success on the test as a whole. In the study, significance was established at $\rho < .05$.

Inquiry into reliability is a proper first step, because, while no test is perfectly reliable, a test which is not reliable is not valid for any purpose. The consultants found the reliability coefficients for both tests to be of sufficient magnitude to indicate satisfactory reliability. They did acknowledge that the methods selected for this purpose were essentially measures of internal consistency (and with the KR-20 formula, of content homogeneity), but apparently believed it either not feasible or not necessary to investigate error variance due to time sampling. The court agrees as to reliability and notes that possible lack of stability over time is, in a sense, mitigated by the fact that applicants may take an exam on more than one administration.

Analyses of item difficulty and discrimination have no direct bearing upon the validation studies before the court. However, they do reflect an investigation into possible modification or supplementation of the tests to improve their utility and reduce the extent of adverse impact, which is a recommended procedure.[20] See DOJ Guidelines, § 3c.

Documentation and Methodology

The EEOC Guidelines, at §§ 1607.5(b)(2,3,5) and 1607.6, require that various items of information (*e.g.* copies of tests, manuals, rating forms and instructions and representations of statistical data) be included in the report of the study or otherwise available for inspection. Following the 1974 A.P.A. Standards, a more extensive list of documentation requirements is specified in the DOJ Guidelines at §§ 4a and 13b, involving some twenty-four "essential" items and

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20 As previously indicated, the 10-C exam was in fact modified through use, effective April 10, 1974, of an 80-item answer key, which had the effect of eliminating for scoring purposes 40 of the items. This particular change was done to improve correlation with an academy average criterion for blacks (rather than to improve item difficulty or discrimination levels), but it indicates the search for increased test utility. The consultants also recommended consideration of possible modification (or supplementation) of 20-B to improve levels of item difficulty and discrimination. Only one administration of the 20-B was given after this recommendation, and that was done when the existing eligibility list had almost been exhausted but mass administration of an additional test (the PAS) had not yet become feasible.

several other desirable items. The Farrar-McLaurin studies satisfy the EEOC requirements, which were the only ones in effect when their studies were conducted and (so far as then feasible) completed and, indeed, when supplemented by evidence presented immediately before and during trial, they also substantially satisfy the DOJ requirements, which became effective on November 23, 1976.[21]

The studies include presentations of the following statistics:

For the 10-C test:

- intercorrelation coefficients, r and r_c, for 109 Birmingham police officers (without separation by race) respecting their 10-C scores, police academy scores (school average and course grades) and latest efficiency ratings.

- means, standard deviations, and *t* tests for difference in means for 10-C scores of 38 black and 101 white Birmingham police officers.

- means, standard deviations, and r coefficients for 59 Birmingham police officers (without separation by race) respecting their 10-C scores, academy scores (average and courses) and latest efficiency ratings.

- means, standard deviations, r coefficients, and *t* tests for the following:

  - 20 black and 76 white Birmingham police officers respecting their 10-C scores, academy averages, and latest efficiency ratings.

  - 8 black and 140 white Birmingham police officers respecting their 10-C scores, academy scores (average and courses), latest efficiency ratings (overall and by sub-parts), and experimental ratings weighted average and by components.

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21 Neither the EEOC nor the DOJ Guidelines require reporting of raw data statistics for Σx, Σx^2, Σy, Σy^2, or Σxy. Such information would, however, be helpful, permitting application of statistical measures not chosen by authors of the report without the loss of accuracy which results from derivation of such items from means, standard deviations and correlation coefficients.

● ● 49 black and 140 white police officers respecting their 10-C scores and academy scores (average and courses). (Also included are data for analyzing significance of differences in correlation coefficients through z transformations.)

● ● 83 Jefferson County deputy sheriffs (without separation by race) respecting their 10-C scores and academy averages.

● ● 77 police officers (without separation by race) from other cities served by the Personnel Board respecting their 10-C scores and academy averages.

For the 20-B test: means, standard deviations, and r coefficients for the following:

● 162 Birmingham firefighters (without separation by race) respecting the 20-B scores, training academy average, and latest efficiency ratings (overall and by sub-parts).

● 196 Birmingham firefighters (without separation by race) respecting their 20-B scores, academy averages, latest efficiency ratings, and experimental ratings (overall and by components). Statistics are reported separately for short-tenure and long-tenure firefighters, using three years of experience as the point of division.

Statistics found to be significant at $\rho < .05$ and $\rho < .01$ are so identified in the report.

Some comment should be made about selection and composition of the different samples. Each sample contained all the persons for whom, so far as was known at the time by the consultants, the data needed for that study was available. The different studies were, however, conducted over a period of several years as either the need was recognized or the particular inquiry became technically feasible; and during the time intervals the work force had changed. Some of the studies involved concern with additional factors (*e.g.*, performance on the Raven and PAS tests, which have been under consideration for use as supplemental or alternative screening instruments), for whom the data existed only for a limited number of applicants or employees. The result is that a particular sample may contain some, but not necessarily all, of the persons in another sample and may also contain some persons who were

not in the other sample. This lack of autonomy or consistency complicates somewhat the process of analysis, but, under the circumstances, is acceptable. There is no hint of contrivance in selection of the samples or of lack of representativeness of the sample subjects.[22]

Criteria

The several criterion-measures (academy grades, efficiency ratings, and experimental ratings) have certain common factors: (1) None appears to be "contaminated" (*i.e.*, affected by knowledge by the rater or scorer of prior score on the 10-C or 20-B). (2) None has been subjected to special statistical scrutiny to detect or control possible bias among raters or graders.[23] (3) None has been subjected to special statistical scrutiny for reliability.[24] (4) Each has been analyzed by the consultants for relevancy (*i.e.*, the extent to which it may be considered as a measure of critical or important work behaviors). Each of the measures has, of course, its own special characteristics and limitations, which will be described separately. It must be emphasized that, in a criterion-related validation study, one is attempting to estimate the extent to which a score on a "predictor" (*e.g.*, 10-C test) can predict job per-

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22 The study of the sample of 59 police officers for whom Raven and PAS test scores were available is subject to question for voluntarism. See A.P.A. Standard E6.1.2.

23 The possibility of bias is of particular concern where subjective evaluations are used as criteria and there are significant differences in those measures for different racial groups. See DOJ § 12b(2). In each study where means and standard deviations are presented separately for blacks and whites with respect to one or more of the basic criterion-measures (academy average, efficiency rating, or experimental rating), the means for blacks is less than for whites, and only in the study which involved but 8 blacks were any of these differences not statistically significant at least at $\rho < .05$. It may be argued that the academy grades should be treated as objective (being based in major part upon multiple-choice exams), but a substantial part of those grades is apparently dependent upon instructors' subjective appraisal of students' performance. (This latter comment is not intended to suggest that more paper-and-pencil test should be used in the academies, but rather than even academy grades are at least in part subjective measures.)

24 See fn. 17, *supra*. Inquiry into the reliability of a criterion is not a trivial consideration. See A.P.A. Standards E4.4. That the various techniques for estimating such reliability have their own limitations affects the interpretation to be reached, not the desirability of making the effort.

formance (*i.e.*, as a police officer) through evaluating its ability to predict scores or ratings on a "criterion" (*e.g.*, academy average)—and hence the study is subject to any limitations which those same criteria have in either predicting or assessing job performance.

(1) Academy Grades.—Where, as here, new employees are required to complete special training before performing their duties, successful completion of that training may properly be used as a criterion-measure, if, that is, the training is intended to, and does, provide skills or knowledge needed for performance of the job. Based upon the evidence presented, including testimony of the directors of the Birmingham police and fire academies, the court finds that the two schools do serve that purpose and function.

Relative standing or ranking among students who successfully complete such training is not, however, as such, an appropriate criterion.[25] Rather, to be relevant as a criterion, such measures must be shown, empirically or otherwise, to be themselves appropriate predictors of job performance. This, in essence, means a two-step correlation study; and, in a situation where one has data on test scores, academy grades, and measures of job performance for the same group of persons, the more direct inquiry (correlation between test scores and measures of job performance) would be preferred to the two-step approach. Grades on particular courses in the academy must also be analyzed for compatibility with findings respecting grades on other courses.

So far as the evidence indicates, academy grades—provided they are passing scores—have no impact on job opportunities, benefits, etc. If this be the case, then, while helpful in preventing "contamination" during validity studies, academy grades are likely to be influenced by motivational considerations not present in actual job performance. The emphasis in the academies on paper-and-pencil multiple choice items, while providing objectivity, may also reflect a relationship to the paper-and-pencil screening exam not found in job performance.

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25 Of course, relative standing or grades in the academy may, depending upon the statistical technique employed, be of use in correlating test scores with successful completion of the training.

These concerns should cause one to be cautious in making non-empirical judgments about the usefulness of relative academy grades as a criterion-measure.

(2) Efficiency Ratings.—The efficiency ratings given periodically on all employees by their supervisors are direct and, ostensibly, appropriate measures of job performance. Drs. Farrar and McLaurin have, however, acknowledged that these ratings are not trustworthy assessments of the employees' actual performance. In addition to other problems, the ratings must be discussed between the rating supervisor and the employee and can have important consequences for the employee. These ratings were, it seems, used in the early studies because of their availability, in the anticipation that other measures could be developed and administered in due course.

(3) Experimental Ratings.—By review of existing job descriptions, by interviews to determine "critical incidents" of the jobs, and by technical assistance and consultation with advisory committees consisting of representative incumbents and supervisory personnel, new "experimental" rating forms were developed for use in the Farrar-McLaurin studies. The forms consist of twelve rating categories for each of the two jobs, the categories relating to personality characteristics, job knowledge, and abilities found through the process to be relevant to job performance. Each is rated on a seven-point scale (poor = 1 to outstanding = 7), with 3 being fixed as adequate. For the police form, weights were developed by the advisory committee to indicate relative importance of the categories to overall job performance.

Raters—the employees' supervisors—were given, in person and in writing, standardized instructions for use of the forms. To prevent the "halo" effect, supervisors rated all their subordinates on one category before proceeding to rate them on the next, etc. The raters were told that their evaluations were confidential and would not be used for any purpose other than the evaluation of the tests.

The court is impressed that the experimental rating method so developed represents an appropriate criterion measure for the jobs in question. These jobs are not ones which lend themselves

to some objective measure, such as the sales produced by a sales representative. The principal limitations with the ratings so obtained are the lack of evidence as to reliability and the lack of special steps to detect or control possible bias.

Study Findings

Key findings from the Farrar-McLaurin studies are tabulated below. Correlations are shown only where presented in the body or exhibits of their reports. Statistically significant differences in means between two sub-groups (blacks and whites; short-tenure and long-tenure firefighters) are indicated by so designating the lower of the two means.

	test	academy	ave	efficiency		rating	experimental		rating
	mean	mean	r	mean	r	acad r	mean	r	acad r
Police									
Applicants									
T=479	65.70								
W=303	75.21								
B=176	49.33**								
Officers									
T=109	82.20		.46**		.12				
Officers									
T=139	69.35								
W=101	75.03								
B=38	54.24**								
Officers									
T=59	81.00	88.66	.77**	81.73	.31**				
Officers									
T=96	80.46	87.94	.72**	81.10	.20	.19			
W=76	84.54	89.00	.64**	81.44	.05	.08			
B=20	64.95**	83.90**	.46**	79.81*	.17	-.05			
Officers									
T=148	82.35	87.38	.45**	84.06	.08		433.79	.21*	
W=140	83.11	87.58	.42**	84.11			434.75		
B=8	69.12**	83.90**		83.18			417.00		
(B=49)	66.78**	83.82**	.47**						
Deputies									
T=83	82.58	87.36	.72**						
Officers									
T=77	79.71	87.50	.60**						
Firefighters									
Applicants									
T=507	70.99								
Employees									
T=162	83.90	90.60	.43**	78.27	.12	-.23**			
Employees									
T=196	81.99	91.27	.45**	79.45	.20**	-.06	61.24	.08	-.09
ST=103	81.01	91.98	.37**	77.14**	.24**	.11	58.65**	.25**	.21**
LT=93	83.09	90.47*	.62**	82.02	.05	-.01	64.11	-.20*	-.20

*$p < .05$
**$p < .01$

Fairness and Differential Validity

If members of one racial group generally obtain lower test scores than members of another group and those differences are not reflected in differences in measures of job performance,

there is a need, where technically feasible, to investigate for possible unfairness of the test to the first group. See DOJ Guidelines, § 12b(7) (noting that this need increases the greater the severity of the adverse impact on the lower-scoring group). As the tabulation indicates, the Farrar-McLaurin studies do show that blacks as a group have scored lower on the 10-C than have whites. Indeed, in each of their studies where those scores are reported separately for the two racial groups, the differences are significant at $\rho < .01$.

One possibility is that the predictive validity of the test for one racial group is significantly different than for the other group. The inquiry here, as emphasized in A.P.A. Standard E9, is not whether there are differences in the correlation coefficients or whether one coefficient is statistically significant while the other is not. Rather, the proper statistical procedure is to test for significant differences in the coefficients.

In the one study in which a sufficient[26] number of both blacks and whites are involved, Drs. Farrar and McLaurin have performed such an analysis. Using the report of test scores and academy scores for 140 white and 49 black police officers, they tested the correlation coefficients (where the coefficient for either subgroup was significant at $\rho < .05$), after z transformations, for significance of difference. None was significant at $\rho < .05$, and with respect to only one course (accident investigation) was the coefficient significant even at $\rho < .10$.

Failure, however, to reject the hypothesis that the correlation coefficients are the same for both groups is not by itself sufficient to demonstrate fairness. Where, as in the present case, test scores by two groups are used in the same manner for members of both groups, it is on the assumption that in general an individual's test score will appropriately predict his standing on the criterion whether he is a member of one group or the other. The predictive relationship between the test score and the criterion can be represented by a regression line[27] formula

26 The DOJ Guidelines, § 12b(7)(v)(1), do not require analysis where less than thirty persons are in either of the subgroups.

27 Scattergrams in the present case do indicate, within the ranges of scores available, that relationships between the predictors and criteria for both racial groups are essentially linear.

for converting a test score into a predicted criterion score. While regression lines can be calculated separately for the two groups and will almost always be somewhat different, it is important to know whether the slopes or intercepts (or both) of the lines are sufficiently different to call for abandonment of a common line for the two groups. Otherwise, the common regression line (which is the effect of using test scores in the same way for both groups) may systematically underpredict for members of one group (while overpredicting for the other) their criterion score from a particular test score. The method for this inquiry, called analysis of variance, involves use of the *F* distribution tables for statistical significance. If desired, one can determine for what test scores the common regression line should, and should not, be abandoned.

Significantly different regression lines may have the same or similar correlation coefficients. In such a situation comparison of the coefficients will not reveal the inappropriateness of using a common regression line. Thus, with the sample containing 76 white and 20[28] black police officers, comparison of the coefficients respecting 10-C scores (and modified 10-C scores) and either academy averages or efficiency ratings does not, as to any comparison, lead to rejection of the hypothesis of the coefficients being the same. Yet, when the same data are reviewed by analysis of covariance, as the court has done,[29] for the hypothesis that a common regression line fits both whites and blacks, the obtained *F* ratios are 18.38 (10-C and academy average), 3.97 (10-C and efficiency rating), 26.91 (modified 10-C and academy average), and 4.18 (modified 10-C and efficiency rating), each of which (with $n_1 = 1$ and $n_2 = 93$) is significant at $\rho < .05$. It is interesting that in the development

28 One should view with caution differential studies where either group has less than 30 members. However, the principal concern is that true differences will not appear to be significant with smaller sample numbers.

29 The court has analyzed the 96-subject sample rather than the 189-subject sample because the report of the former includes deviation and correlation data not only for the two racial groups but also for the sample as a whole, facilitating analysis. It should be recognized that analysis from such statistics are subject to rounding errors which could have been avoided had raw data summations been provided.

of the modified 80-item scoring key for the 10-C, adopted to increase the validity coefficient for blacks, the evidence becomes stronger that a common regression line should not be used for both groups.

In view of the fact that covariance analysis suggests rejection of a common regression line for both racial groups, one is tempted—since the differences between white and black means appear to be far greater on test scores than on the criterion-measures—to conclude that the performance of blacks is being underpredicted by the 10-C. However, if regression lines are computed separately for blacks and whites using the results of any of the studies where their test scores and criterion scores are reported separately, it will be found that the lines cross and that for test scores below that crossing point the criterion scores thereby predicted for blacks are less than for whites for the same test scores. Above that point there would be underprediction for blacks, but the intersections occur at such high test scores (the lowest point from any of the data is at a raw test score of 87) that few blacks would actually be affected. If one looks to see where any overprediction or underprediction is statistically significant, it is found that the only significant range of scores is for lower scores, where blacks are being overpredicted by the 10-C.[30]

The net result is that use of 10-C test scores in the same manner for both blacks and whites does not appear to be underpredicting the performance of blacks at the academy or on efficiency ratings. This analysis does not, of course, deal with the possibility of bias affecting the scores blacks obtain at the academy or on efficiency ratings; it only serves as a foundation for concluding that the 10-C is not to be criticized on the basis of differential validity inquiries. The 20-B cannot be subjected to these inquires at the present time for lack of sufficient blacks in any study group.

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30 Absent "adverse impact" on whites as a whole, the "underpredicted" whites cannot challenge the test under Title VII.

Operational Unity

It is not, however, sufficient that, as here, a test is shown to have a statistically significant relationship to one or more criteria and not to be differentially unfair to the adversely affected racial group. In addition, in the words of the EEOC Guidelines, § 1607.5(c), the relationship between the test and the criterion must have "practical significance" or, in the words of the DOJ Guidelines, § 12b(5), the usage of the test must be evaluated "to assure that it is appropriate for operational use." With different words, the two Guidelines are raising the same concern.

In concluding that the 10-C and 20-B tests are valid screening instruments, Drs. Farrar and McLaurin have emphasized their significant relationship to grades in the training academies, and this relationship cannot be doubted. However, as already indicated, it is the court's conclusion that *relative* standing in the academies, as distinguished from successful completion of academy training, is not an appropriate criterion unless it also be demonstrated that those academy grades are themselves valid predictors of job performance. The studies reflect, however, that for the most part the correlation between academy grades and measures of job performance are not significant and, in the few instances where significant correlations are found, the findings are mixed—some being positive and others being negative. A negative correlation, of course, indicates that the higher the academy grades, the lower the performance ratings tend to be. Although an employer is permitted to select the best person for the job despite resulting impact on a racial group, it is not permitted to engage in such selection procedures merely to employ the best person for training.

Nor has it here been demonstrated that either test is a valid predictor of successful completion of the required training courses. According to the director of the policy academy, only 11 of the 733 cadets attending the academy since 1962 have failed to complete the training because of inadequate grades—and no data has been presented as to their 10-C test scores. According to the director of the firefighters academy, no student has failed because of poor grades. of course, since historical use of screening tests (whether the present ones or their

predecessors) has imposed a restriction of range, the conclusion does not necessarily follow that every applicant could complete the training no matter how low his 10-C or 20-B score. However, it should be noted that on occasion the raw test scores used to determine hiring eligibility have been substantially reduced, without apparent impact on their successful completion of the academies. And—while recognizing that, as noted by Dr. McLaurin, this is not a recommended practice[31]—use of the regression lines developed from any of the studies would predict passing academy averages even for persons scoring zero on the 10-C and 20-B tests.

As earlier discussed, the regular efficiency ratings are not trustworthy criterion-measures of actual job performance. Even if they were, the studies provide inconclusive findings with respect to the 20-B (a significant correlation with a group of 196 firefighters, though only of a magnitude of .20, and an insignificant correlation of .12 with a group of 162 firefighters), and even more dubious results with respect to the 10-C.[32]

The experimental ratings are, as previously indicated, considered by the court as an appropriate criterion measure. The correlation, however, between the 20-B and these ratings is found to be .08, which is, of course, not significant; and, while a significant positive correlation is found with respect to the 103 firefighters having less than 3 years service, a significant negative correlation is found the for the 93 having at least 3 years of tenure. Presumably, higher scores on the 20-B (which carried over to higher scores during academy training) resulted in better job performance for the first few years. Had

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31 Regression lines should not generally be used for prediction based on predictor scores which are beyond the range of predictor scores found in the sample, for beyond such known scores the relationship may cease to be significant, may cease to be linear, or may have a slope change. Of course the same possibilities exist when one attempts to justify non-selection based upon correlation coefficients developed through the subjects selected or when one attempts to modify coefficients for restriction of range, such as Drs. Farrar and McLaurin have done.

32 The correlations between the 10-C and efficiency ratings were significant only with respect to the volunteer group of 59 officers.

this advantage merely been erased after more time on the job, this would be one matter—but, as stated, the findings actually showed a significant negative correlation for the longer tenured firefighters, suggesting that over time the lower scoring applicants made the better employees. Absent any indication that during the first few years the lower scoring applicants had been inadequate on the job, one is hard pressed to conclude that the higher scoring 20-B applicants are in fact the better persons to hire. Further study might, of course, lead to other interpretations, such as a determination that recent improvements in the training given at the firefighters academy will result in better employees not only initially but also over time—but no such conclusions can be supported on the present evidence.

The correlation between the 10-C and the experimental ratings is, with 148 in the sample, significant at $\rho < .05$, but has a magnitude of only .21. What do these figures mean? To begin with, it should be understood that for a correlation coefficient to be found significant at $\rho < .05$ is equivalent to saying that, if in fact no relationship between the two variables exists for the "population", the obtained results could be expected to occur only once in twenty such samples—and that therefore one can be 95% confident that for the population (of applicants) there is some correlation (or relationship) between the two variables. It does not mean that one can be 95% confident that the population coefficient is .21. Indeed, to state the population coefficient with only a 5% chance of error (*i.e.*, $\pi < .05$) requires use of a confidence *interval*: here, with a sample of 148, that the true coefficient lies somewhere between .0504 and .3592. The coefficient obtained from the sample is but an estimate of that true population coefficient.

A second consideration is to look at the test scores in the particular sample in comparison with the scores of all persons in the population. Where, as here, there is a restriction in the range of test scores of those in the sample because of prior use of the test, a statistical technique, called correction for restriction of range, may be appropriate for determining the magnitude of the correlation. This "corrected" coefficient, as reported by Drs. Farrar and McLaurin, is .36. It may be noted that utilization of the correction involves the assumption that the two variables (test scores and experimental ratings) are for

the total population "normally distributed;" and, insofar as rating scores are concerned, it is just that—an assumption. Hence, it involves the same type of risk as does the use of a regression formula for values beyond the sample on which based—a technique which, during the trial, provoked Dr. McLaurin's criticism.

In general, other factors remaining the same, the greater the magnitude of the coefficient the more likely it is that the test will be appropriate for use. See DOJ Guidelines, § 12b(5). The importance of the size of the correlation coefficient can perhaps best be understood by reference to certain basic statistical concepts. The square of the correlation coefficient, called the "coefficient of determination," gives the proportion of the variance of the criterion scores which is accountable by reference to variance of scores on the predictor test. Thus, with a correlation coefficient of .21, the study indicates that 4.4% of the variance among experimental ratings is explainable by reference to the variance in test scores, while 95.6% is not. Using the "corrected" coefficient of .36, still only 13% of the variance among experimental ratings could be accounted for by test score variance. By another formula, the correlation coefficient can be converted into a "coefficient of alienation", which gives the size of the error in attempting to predict experimental rating scores from test scores *relative* to the error that would result from a mere guess, *i.e.*, by not using the test. This calculation, based on a correlation coefficient of .21, reflects that use of the test predicts experimental rating scores with a margin of error that is only 2% smaller than it would be without the test, and, if based on the "corrected" coefficient of .36, indicates that the margin of error is only 6.7% less than what would occur by mere guess.

Anastasi comments, and quite properly so, that evaluation of a test in terms of the error of estimate will for many testing purposes be unrealistically stringent. Anastasi, PSYCHOLOGICAL TESTING, p. 166 (4th Ed. 1976).[33] She notes that even

33 The Anastasi volume was qualified during trial as a recognized treatise under F.R.E. 803(18). Additional standard texts used by the court for the purpose of taking judicial notice of basic statistical formulae are Guilford & Fruchter, Fundamental Statistics in Psychology and Education (5th Ed. 1973); Walker & Lev, Statistical Inference (1953); Burrington & May, Handbook of Probability and Statistics (2nd Ed. 1970); and Mehrens & Lehmann, Standardized Tests in Education (2nd Ed. 1975).

tests with an unusually high validity of .80 would appear to be inefficient if used to predict inividuals' relative standing on some criterion, but that most tests are merely used to determine which individuals will exceed a given minimum standard of performance or cutoff point in the criterion. The 10-C, of course, is utilized here both to screen applicants (cutoff scores) and to rank those passing applicants.

While the magnitude of the correlation coefficient is obviously of great importance, there is no minimum coefficient applicable to all employment situations. See DOJ Guidelines § 12b(5). "Under certain circumstances, even validities as low as .20 or .30 may justify inclusion of the test in a selection program." Anastasi, *op. cit.*, p. 166.

Another approach towards evaluation of the relationship found is to investigate the meaning of differences in test scores in relation to the differences in criterion scores thereby predicted. This involves use of the regression formula, which can be calculated from the correlation coefficient and the means and standard deviations of the two variables. Thus, Dr. Roland Ramsey, the plaintiffs' expert witness, questioned the practical value of the 10-C by noting, from the Farrar-McLaurin study involving 140 whites and 49 blacks, that an increase in raw test scores of 40 points produced, under the regression lines given, less than 5 points increase in predicted academy averages.

The common regression line computed for the 148 officers with both test scores and experimental ratings is $\bar{y} = 300 + .162x$, where x represents a given test score and $\bar{y}$ is the rating predicted thereby. At first glance, this regression line does not appear to be subject to the criticism made by Dr. Ramsey respecting the other study, for it will be seen that, for example, a test score difference of 10 will predict an experimental rating difference of 16. However, it should be understood that the linear regression formula (as well as the criterion mean and criterion standard deviation, although not the correlation coefficient) varies in direct proportion to any factor by which

criterion scores in the sample have been multiplied. The Farrar-McLaurin study reports the overall experimental rating as the summation of weighted components which comprise the rating. For example, a sample subject rated as 5 (very good) on each of the 12 rating components would, because of the method, be reported as having a rating score of 499, while another subject identically rated except for scores of 4 (good) on the appearance and dependability components would receive an overall rating of 483, with 698 representing a "perfect" score of 7's on all components.

To prevent potential misinterpretation, it is well to consider the regression line not only in the form in which expressed in the Farrar-McLaurin studies, but also in a form which does not contain the inflation caused by the weighting procedure. This can be done, while still retaining the concept of the components having differing weights, by expressing the weights in a manner in which the average weight is 1. That is, instead of the "communication" component having a weight of 8.78 (as reported in the study), of "problem solving" a weight of 9.44, of "learning" a weight of 8.22, etc., they can be shown as having weights of 1.056, 1.136, and .989, etc., respectively. Then, a summation of weighted component scores for a "perfect" score of 7 on all 12 components would result in 84, identical with a "perfect" score if not weighted. Not only does this method retain the concept of weighing the different components, but the transformation (whether of means, standard deviations, or regression line) can simply be made by dividing the reported results by a constant, here 8.31333. The obtained regression line if $\bar{y} = 36.087 + .195x$, where x represents the test score and $\bar{y}$ is the predicted rating (using the new method of expressing weights). It will now be seen that, as with the other studies criticized by Dr. Ramsey, a large difference in test scores produces only a small difference in predicted (un-inflated) experimental rating scores, *e.g.*, a 40 point raw score difference on the test gives less than 8 points difference on the rating score.

Another method for evaluation, which is not complicated by the weighting procedure, is to consider the "standard error of estimate", which, for the data analyzed, is computed to be 92.63. Use of this statistic is demonstrated as follows: while a

raw test score of 70 through the regression formula predicts an experimental rating of 413, one can through use of the standard error of estimate determine, at $\rho < .05$, the experimental rating actually to lie within the range of 231 to 595. Similarly, the predicted experimental rating, at $\rho < .05$, from a raw test score of 40 is found to be in the range of 183 to 547. Obviously, there is a potential overlap, where persons with raw scores of 40 and 70 on the test may nevertheless obtain the same experimental rating score. It is, furthermore, possible to determine how much of a difference in test scores is required for one to be able to predict, at $\rho < .05$, that the higher-scoring applicant will receive an experimental rating which also is higher[34]—and this calculation results in a finding that a difference in test scores of over 86 raw points is necessary for such a conclusion to be reached. It should be noted that the total range of raw test scores to this date used to rank successful applicants (*i.e.*, from a low raw score of 48 to the perfect score of 120, which has not been obtained by any) is yet too limited to enable one to say, at the .05 level, that the highest-scoring applicant would be predicted to obtain a higher experimental rating than the lowest-scoring applicant.

Since the 10-C is utilized not only in an attempt to rank the successful candidates, but also to screen the unsuccessful, it is appropriate to analyze the study results with respect to minimum experimental ratings and to predictions for persons scoring at, and below, the test cut-off scores. A test score of 48, the lowest used as a cut-off, yields a predicted experimental rating of 378, or an average unweighted rating on each component of the experimental rating of 3.78 (3 = adequate, 4 = good).[35] Common regression lines can, of course, also be

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34 A note should be made of this technique since not directly given in most texts [sic]. Using the normal curve, the possibility of scores exceeding $\bar{y}/\sigma = +.76$ is .2236 and likewise the possibility of scores being less than $\bar{y}/\sigma = -.76$ is .2236. The possibility of both events occurring is $.2236^2$, or .05. Accordingly, there must be a separation of 2(.76) x standard error of estimate for two predicted scores to be different at $\rho < .05$. One can then determine the difference in predictor scores necessary to produce this separation in predicted scores.

35 By comparison, a raw-test score of 106 (the highest reported in the study for any subject) yields a predicted experimental rating of 472, or an average unweighted rating on each component of 4.73 (5 = very good).

computed separately for each of the twelve components of the rating. When this is done, one finds that a test score of 48 will as to each component predict an unweighted rating of 3 or above, *i.e.*, at least "adequate." While recognizing the risk in extrapolation beyond the range of sample scores,[36] but having little else available for comparable analysis, one can look to estimates of experimental ratings predicted by the regression lines for test scores below 48. If this is done, it appears that even with a test score of 0 the predicted rating is "adequate" or above for the rating as a whole and for seven of the twelve components. Even as to the five components for which the estimated unweighted experimental rating from a 0 test score would be less than 3, the predicted rating cannot be said to be less than "adequate" at $p < .05$.

A technique for evaluating tests which employ cut-off scores for screening purposes is to consider "false positives" (persons scoring below the cutoff but nevertheless scoring above the acceptable level of performance on the criterion) in relation to "false acceptances" (persons scoring above the cutoff but below the acceptable level of performance), thereby leading to a comparison between the relative percentage of successful employees above and below the cut-off scores. However, neither this method nor the Taylor-Russell tables (used to estimate net gain in selection accuracy through test usage) can be directly used in the present case because all employees for whom "success" data are available have been screened by the test. It is possible to project the "base rate" (through use of the regression line, standard error of estimate, and normal distribution curves) and then to conduct such inquiries; and, if this be done, one finds any incremental validity to be negligible.

Still another approach is to estimate the effect of the test not on the percentage of persons exceeding minimum performance, but on overall performance of the selected persons. A table given by Anastasi, *op cit.* at p. 173, gives the expected rise in criterion scores through test usage in relation to its validity coefficient and the selection ratio. In the present case,

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36 See fn. 31, *supra*, and the discussion on page 21 of this opinion respecting assumption of normal distribution when a correlation coefficient is corrected for restriction of range.

with a .21 coefficient and a selection rate of .19 (506 officers hired from 2721 applicants), and with a standard deviation of known criterion scores of 94.74, one finds from the table that use of the test (had the applicants actually been hired in the order of the test scores) would probably have produced an average gain of 27 points in the total weighted experimental rating (over the rating expected had the test not been used). This gain is equivalent to being rated one point higher on three of the 12 rating components. The average unweighted rating on each of the components would, without the test, have been 4.07 (4 = good), which compares to 4.35, using the test.

The assessment of utility of a test which, like the 10-C, has a statistically significant validity, albeit of very low magnitude, must include certain value judgments. One of these involves consideration of the nature of the job in question and the consequences of a faulty hiring decision. There can be little dispute that police officers perform a vital, and sensitive, function in our society. The desirability of "upgrading" of law enforcement has been emphasized in two reports received in evidence, the 1967 Task Force Report on the Police, issued by the President's Commission on Law Enforcement and the Administration of Justice, and the 1973 Report on Police, issued by the National Advisory Commission on Criminal Justice Standards and Goals. Economic costs are also involved, particularly in view of the cost of academy training of officers and the restraints placed upon discharge of marginal officers under the civil service laws.

Without demeaning the importance of law enforcement officials, however, it can hardly be said that the possibility of occasional selection of an inept officer presents the same type of daily economic and human risk factors as is involved, for example, in the employment of airline pilots or bus-drivers. *Cf. Spurlock v. United Airlines, Inc.* [5 EPD ¶ 7996] 475 F.2d 216, 219 (CA7 1972); *Usery v. Tamiami Trail Tours, Inc.* [11 EPD ¶ 10,916] 531 F.2d 224 (CA5 1976) (Age Discrimination in Employment Act case, with somewhat related question). A twelve months' probationary period is provided, during which time the occasional incompetent may be detected and dismissed and during part of which time the employee is undergoing training rather than being "on the street". The principal public con-

cern, it would appear, is not so much that the most able officers be employed (though that, certainly, would be desirable) as that the emotionally unfit not be employed. In this context, it is perhaps noteworthy that the 1967 Presidential Commission's report contained a recommendation for use of psychological tests to detect applicants with personality defects (but no such recommendation respecting aptitude tests); and the 1973 National Advisory Commission's report, while acknowledging the desirability of valid aptitude tests, was skeptical as to the results of research to that date. So far as the court has been informed, the 10-C was not designed, and has not been validated, for use in detecting emotional disorders or defects.

The DOJ Guidelines § 12b(b), provide that, in determining operational appropriateness, one should consider "the degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity, and the need of an employer, required by law or regulation to follow merit principles, to have an objective system of selection." Obviously this latter factor (requirement under civil service law to give some objective test) cannot by itself suffice as justification for a test which has, as here, substantial adverse impact on a racial group. While it can be said that no other available[37] selection with greater validity than the 10-C has been found, yet it must also be said—considering the minimal benefits resulting from the 10-C in the context of this employment situation—that no-test-at-all has "substantially" the same practical validity as the 10-C.

In summary, the 20-B Firefighter test has not been shown to be a valid predictor of a job-relevant critrion measure and the 10-B Policeman test, while having a statistically significant relationship of a very low magnitude with a job-relevant

37 Studies of the PAS, developed by Drs. Farrar and McLaurin, show extremely high correlations with experimental ratings, as well as with academy training and efficiency ratings. Ironically, the results are so promising as to cause some concern as to a spurious relationship which may not be replicated. In any event, technical difficulties, unresolved to date, have prevented its administration on a wide-scale basis such as for all applicants, so that for practical purposes it is not "available".

criterion measure, has not been shown to be appropriate for operational use in screening or ranking applicants.[38]

Violation and Remedy

Having concluded that use of the 10-C and 20-B has had an adverse impact upon black applicants and that the studies presented fail to demonstrate job-relatedness, the court must nevertheless determine when the requirements of law were violated and what relief is appropriate therefor. This inquiry should involve no less care than consideration of the tests themselves.

The requirements of Title VII first became applicable to the Personnel Board in March 1972. At that time, and for many years earlier, the Board was required by state law to administer appropriate tests to screen and rank applicants—a requirement which continues to the present time, subject to any over-riding proscriptions of Title VII. It had several years earlier selected the 10-C and 20-B tests as the best tests then available, with the hope that black applicants would fare better than under previous tests. By March 1972 a preliminary, in-house validity study had been conducted, which reflected some improvement in hiring of blacks and the indication of appropriate validity based upon relationship with existing criterion measures. An in-depth independent validation study was immediately undertaken, including investigation of alternative or supplemental selection procedures to improve the predictive validity or decrease adverse impact upon blacks. At least since 1965 the Board has not intentionally discriminated against blacks applicants but, to the contrary, has attempted to increase black employment within the options available under state law, including modification of the scoring key for the 10-C when

38 Correlation studies respecting efficiency ratings and "experimental" ratings were conducted only for officers employed by the City of Birmingham. However, the evidence is persuasive that job requirements for deputy sheriffs and for police officers employed by other municipalities are essentially the same as for Birmingham officers. The higher correlations found with respect to academy training are not of themselves sufficient to justify a conclusion as to operational validity for these officers different from that reached respecting Birmingham.

recommended by the consultants as a method for increasing validity of the test for black applicants.

The preliminary reports from the consultants, made while more trustworthy measures of job performance were being developed, contained signs of potential validity and recommended continued usage of the test pending the additional studies. Not until April 25, 1975, with respect to the 10-C, and July 8, 1976, with respect to the 20-B, were the studies using these new criterion measures completed and reported to the Board. It was on these respective dates that, in the court's opinion, it should have been concluded that provisional use of the tests was no longer permissible. Prior thereto, the Board was, in the court's opinion, justified in continuing to use the tests (and the eligibility lists generated therefrom) in anticipation of favorable results from those studies. Use of the tests (or of the eligibility lists therefrom) was thereafter, however, contrary to the requirements of Title VII, which override state law inconsistent therewith.

The remedy should be appropriate to the violation found. In this case, from X-11, it is found that, for the two administrations of the 10-C from which eligibility lists used after April 25, 1975, were formed, 658 (or 88%) of the 747 white applicants were placed on the eligibility lists. Had a like percentage of black applicants been so placed, a total of 252 would have been on the lists—128 more than actually placed on the list. Accordingly, to the extent they are still interested, an additional 128 blacks from the prior administrations of the test should be added to the present eligibility lists. This remedy only relates to prohibited use of the 10-C as a screening instrument. An additional measure is needed to correct for the improper use of the test as ranking procedure. Had the eligibility lists been representative of the applicant group and had certifications from the list likewise been representative of the racial composition of the list, approximately 28% of the persons certified would have been black. It is clear that there has been "under-certification" of blacks by this standard, although the precise degree cannot be determined from evidence before the court, which gives such information only by calendar years. The Board is directed to ascertain the extent of such under-certification and in future certifications to include at least 1 black candidate from every 3 certified until such time that, considering the certifications after April 25, 1975, total number of blacks certified becomes 28% of the total number of persons certified. Thereafter (and until some new selection procedures are adopted which are sufficiently job-related or which have no adverse impact upon blacks) at least 2 of every 7 persons certified by the Board from the revised present list shall be black, provided there be a sufficient number of black applicants interested.

A similar investigation of X-11 with respect to the 20-B, where only one eligibility list has been in effect since July 8, 1976 (the date of the report involving the experimental ratings), results in a conclusion that 91 black applicants should be added to the present eligibility list for firefighters, that at least 1 of every 3 persons hereafter certified shall be black until such time that (considering certifications after July 8, 1976) the total number of blacks certified becomes 14%[39] of the total number of persons certified, and that thereafter (pending adoption of some other valid or non-discriminatory selection instrument) at least 1 of every 7 certified by the Board from the revised current list shall be black.

This order does not preclude use of the 10-C or 20-B as a device for ranking one white as against another white, or one black as against another black. Such a use may be made by the Board, if it so desires, without any discriminatory impact on a racial group. The order does not prevent the Board from new administrations of the 10-C or 20-B (or other tests) or from forming new eligibility lists from time to time; provided, however, that, unless and until a selection instrument is found which either has no adverse impact racially or is sufficiently valid, the test results shall be used in a manner consistent with this opinion, *i.e.*, the eligibility list and certifications to be representative racially of the applicant group regardless of test scores.

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39 Blacks constituted only 14% of the applicants on the only administration of the 20-B involved.

Order

Pursuant to the findings and conclusions contained in the Memorandum of Opinion filed herewith, unavoidably protracted because of the need to detail the findings of fact and the reasons therefor, it is ordered as follows:

1. Use by the Personnel Board of Jefferson County of the 30-B Office Workers test has not violated Title VII or other applicable law.

2. Use by the Personnel Board of Jefferson County of the 10-C Policeman Test and the 20-B Firefighter Test has violated Title VII since April 25, 1975, and July 8, 1976, respectively.

3. To the current eligibility list for police officers and deputy sheriffs the Personnel Board shall add the names of 128 black applicants from prior administrations of the 10-C to the extent such number are still interested. In future certifications, at least 1 black on the revised eligibility list shall be certified for each 3 persons certified until such time that the total number of blacks certified after April 25, 1975, shall be 28% of the total number so certified. Thereafter during use of the current eligibility list as so revised, at least two persons of every seven certified shall be black. Pending adoption of some selection procedure which either has no adverse effect upon black applicants or is sufficiently job-related, the number of blacks on any new eligibility list (and certified therefrom) shall be representative of the number of the black applicants.

4. To the current eligibility list for firefighters, the Personnel Board shall add the names of 91 black applicants from prior administrations of the 20-B to the extent such number are still interested. In future certifications, at least 1 black on the revised eligibility list shall be certified for each 3 persons certified until such time that the total number of blacks certified after July 8, 1976, shall be 14% of the total number so certified. Thereafter, during use of the current eligibility list as so revised, at least one person of every seven certified shall be black. Pending adoption of some selection procedure which either has no adverse impact upon black applicants or is sufficiently job-related, the number of blacks on any new eligibility

list (and certified therefrom) shall be representative of the number of black applicants.

5. In accordance with F.R.Civ.P. Rule 55(b), the court expressly determines that there is no just reason for delay and expressly directs entry of judgment as to the issues here involved, namely, whether use by the Personnel Board of the 10-C, 20-B, and 30-B tests are proscribed by law and, if so, the appropriate remedy therefor.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ENSLEY BRANCH OF THE N.A.A.C.P., *Plaintiff,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CA 74-Z-12-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CA 74-Z-17-S
UNITED STATES OF AMERICA, *Plaintiffs,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CA 75-P-0666-S
LUCY WALKER, *et al.*, *Plaintiffs,* v. JEFFERSON COUNTY HOME, *et al.*, *Defendants.*	CIVIL ACTION NO. CA 76-M-0247-S

ORDER

Pursuant to the findings and conclusions contained in the Memorandum of Opinion filed herewith, unavoidably protracted because of the need to detail the findings of fact and the reasons therefor, it is ordered as follows:

1. Use by the Personnel Board of Jefferson County of the 30-B Office Workers test has not violated Title VII or other applicable law.

[1985 Trial DX 1422]

2. Use by the Personnel Board of Jefferson County of the 10-C Policeman Test and the 20-B Firefighter Test has violated Title VII since April 25, 1975, and July 8, 1976, respectively.

3. To the current eligibility list for police officers and deputy sheriffs the Personnel Board shall add the names of 128 black applicants from prior administrations of the 10-C to the extent such number are still interested. In future certifications, at least 1 black on the revised eligibility list shall be certified for each 3 persons certified until such time that the total number of blacks certified after April 25, 1975, shall be 28% of the total number so certified. Thereafter, during use of the current eligibility list as so revised, at least two persons of every seven certified shall be black. Pending adoption of some selection procedure which either has no adverse effect upon black applicants or is sufficiently job-related, the number of blacks on any new eligibility list (and certified therefrom) shall be representative of the number of the black applicants.

4. To the current eligibility list for firefighters, the Personnel Board shall add the names of 91 black applicants from prior administrations of the 20-B to the extent such number are still interested. In future certifications, at least 1 black on the revised eligibility list shall be certified for each 3 persons certified until such time that the total number of blacks certified after July 8, 1976, shall be 14% of the total number so certified. Thereafter, during use of the current eligibility list as so revised, at least one person of every seven certified shall be black. Pending adoption of some selection procedure which either has no adverse impact upon black applicants or is sufficiently job-related, the number of blacks on any new eligibility list (and certified therefrom) shall be representative of the number of black applicants.

5. In accordance with F.R.Civ.P. Rule 55(b), the court expressly determines that there is no just reason for delay and expressly directs entry of judgment as to the issues here involved, namely, whether use by the Personnel Board of the 10-C, 20-B, and 30-B tests are prosecribed [sic] by law and, if so, the appropriate remedy therefor.

This the 10th day of January, 1977.

/s/ Sam C. Pointer, Jr.
United States District Judge

TABLE ONE

Adverse Impact Counts by Race

Results of Review for Impact Calculations	Number of Announcements	Blacks Affected	Whites Affected
No Data on 28B Scores	22		
No Eligible Blacks	36		
No Eligible Whites	4		
Impact on Blacks	4	15	
Impact on Blacks, but only by a Single Ratee	17	39	
No Impact by 28B Scores	20		
Impact on Whites	3		11
Impact on Whites, but only by a Single Ratee	7	—	169
	113	54	180

54 ÷ 827 total Black ratings on 28B* = 6.53%

180 ÷ 2254 total White ratings on 28B* = 7.99%

* Includes only employees rated who could have attempted a promotional exam.

[1979 Trial DX 360 and 1985 Trial DX 1980]

THE PERSONNEL BOARD OF JEFFERSON COUNTY,
Room 320 Courthouse, Birmingham
Announces an Open Examination For

FIREFIGHTER,
Cities of
Bessemer, Birmingham, Fairfield, Homewood, Mountain Brook and Ta

TIME: 9:00 A. M., Friday, April 26, 1957.

PLACE: Room 318 Courthouse, Birmingham, Alabama.

SALARY RATES: Beginning and maximum rates:

Birmingham) $314 -$370; less 6% deduction for retirement
) pension.

Bessemer) $299 - $352; less 2 1/4% deduction for Federal
Fairfield) Social Security.
Mountain Brook)

Homewood) $285 - $333; less deduction for Federal Social
Tarrant City) Security and/or retirement pension.

APPLICATIONS AND FINAL FILING DATE: Applications may be obtained at the office of the Personnel Board, Room 320 Courthouse, Birmingham, until 4:00 P. M., Wednesday, April 24, 1957, upon payment of $1.50 application fee.

Applicants applying after April 24, 1957 will be notified when to ...ar for the examination.

PURPOSE OF EXAMINATION: . establish eligible registers from which to fill positions in the Fire Department of the Cities of Bessemer, Birmingham, Fairfield, Homewood, Mountain Brook and Tarrant City.

ENTRANCE REQUIREMENTS: The residence of applicants is not restricted, but applicants placed on the eligible registers who live in the jurisdiction to be served will be certified first.

Applicants must be white, male, and meet the qualifications prescribed below:

BESSEMER: Age: 19 and must not have passed 36th birthday; Height: 5' 8" to 6' 2"; Weight: 140 to 220 pounds.

BIRMINGHAM: Age: 21 and must not have passed 27th birthday; Height: 5' 9" to 6' 4"; Weight: 150 to 240 pounds.

FAIRFIELD: Age: 21 and must not have passed 35th birthday; Height: 5' 8" to 6' 4"; Weight 145 to 225 pounds.

HOMEWOOD: Age: 19 and must not have passed 35th birthday; Height: 5' 8" to 6' 2"; Weight: 150 to 220 pounds.

MOUNTAIN BROOK: Age: 19 and must not have passed 35th birthday; Height: 5' 7" to 6' 2"; Weight: 135 to 220 pounds.

TARRANT CITY: Age: 21 and must not have passed 35th birthday; Height: 5' 8" to 6' 4"; Weight: 140 to 240 pounds.

REQUIRED KNOWLEDGES, ABILITIES AND TRAINING: Graduation from an accredited high school, or equivalent; ability to understand and follow oral and written directions; general knowledge of firefighting practices; mechanical aptitude; mental alertness; ability to solve arithmetic problems of reasonable difficulty; excellent physical condition and good moral character.

DUTIES: Under supervision, during an assigned shift, to assist in the control and extinguishment of fire, protection of life and property and the maintenance of Fire Department quarters and equipment.

(OVER)

[1979 Trial PX 7 and 1985 Trial DX 1980]

BEST AVAILABLE COPY

[1979 Trial PX 70 and 1985 Trial DX 1980]

PROMOTIONAL POTENTIAL RATINGS

OF BLACKS AND WHITES

BY DEPARTMENT

(August , 1977 - January, 1978)

Department	Black Pass #	Black Rated #	White Pass #	White Rated #	Blk. Pass Rate %	Wh. Pass Rate %	B:W Pass Rate %	Chi-Sq * Value	Chi-Sq. Value (Yates Corrected)	Exact ** Probability
1. Jefferson County										
Bd. of County Comm.	1	1	2	2	100.0	100.0	100.0	0	0	1.00000
Budget & Mgt. Off.	-	-	7	10	-	70.0	-	-	-	-
Community Develop.	3	3	10	17	100.0	58.82	>100.0	1.90	.52	.25088
County Attorney	-	-	1	1	-	100.0	-	-	-	-
Personnel Board	2	2	16	17	100.0	94.12	>100.0	.12	.12	.89474
Accounting	1	1	13	14	100.0	92.86	>100.0	.08	3.23	.93331
Sewer Billing	-	-	6	6	-	100.0	-	-	-	-
Revenue	16	16	55	61	100.0	90.16	>100.0	1.71	.41	.23419

* The critical values for chi-square are as follows:

χ^2 =	.10	.05	.01	.005	.001
	2.71	3.84	6.63	7.88	10.83

** [illegible]e in this probability column represent the likelihood of observing a deviation from the expected numbers of blacks an[illegible]res passing that is in the same direction and at least as large as the observed deviation. The values were computed by summing exact probabilities derived by means of the hypergeometric distribution.

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PROMOTIONAL POTENTIAL RATINGS

(Continued)

	Black Pass #	Black Rated #	White Pass #	White Rated #	Blk.Pass Rate %	Wh.Pass Rate %	B:W Pass Rate %	Chi-Sq. Value	Chi-Sq. Value (Yates Corrected)	Exact Probability
Birmingham										
Recorders Court	2	8	16	18	25.0	88.89	28.12	10.61	7.83	.00281
Police Uniform	38	56	503	598	67.86	84.11	80.68	9.47	8.36	.00331
UNDO	-	-	8	8	-	100.0	-	-	-	-
Fire	2	11	399	523	18.18	76.29	23.83	19.45	18.47	.00010
Fire Administration	0	1	35	51	0	68.63	0	2.1	.14	.32692
Traffic Engineering	5	12	29	41	41.67	70.73	58.91	3.41	2.26	.06797
Engineering	5	7	56	63	71.43	88.89	80.36	1.71	.51	.21920
Streets & Sanitation	25	63	166	223	39.68	74.44	53.31	26.75	25.21	.00060
Municipal Garage	2	3	21	24	66.67	87.50	76.19	.92	.01	.39453
Building Maintenance	7	7	12	15	100.0	80.0	>100.0	1.62	.37	.29545
Inspection Services	4	5	58	75	80.00	77.33	>100.0	.02	.02	.68686
Municipal Airport	-	-	16	17	[illegible]	94.12	-	-	-	-
[illegible]& Recreation	11	32	65	107	34.38	60.75	56.59	6.91	5.89	.007[illegible]
[illegible]l Stadium	-	-	1	1	-	100.0	-	-	-	

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S

PLAINTIFF UNITED STATES' POST TRIAL BRIEF AND REVIEW OF EVIDENCE

The United States respectfully submits this Post Trial Brief and Review Evidence on the issues tried during the proceedings held on August 6-10, 1979 and October 15-19, 1979.

Introduction

At the conclusion of this segment of the trial of the Plaintiffs' claims the Court invited the parties to submit a review of the evidence on the issues presented at trial. The Court also indicated that the Plaintiffs' [sic] could respond to the Brief filed by the Personnel Board on October 17, 1979.

The Government has decided to combine its review of the evidence with its response to the Personnel Board's Brief. We have where possible included in our review of the evidence citations to the record. However, since the parties have yet to receive the transcript of the proceedings held on October 15-19, which involved the major part of the Board's defense on testing and other issues and our rebuttal evidence, we have in these areas relied principally on the trial exhibits and the notes and memory of trial counsel.

I. WRITTEN TESTS

A. Introduction

In this section, the Government will review the general evidence concerning the validity of the challenged examinations and will, pursuant to the Court's request at the Post-Trial Conference, specifically address the evidence concerning the

[1985 Trial DX 1428 and DX 1429]

validity of the examinations used in the following job classes: account clerk, accountant/auditor, automotive mechanic, bailiff, engineering aide, housing inspector, intermediate clerk, police sergeant/sheriff sergeant, secretary, senior clerk, senior recreation leader, stenographer/intermediate stenographer and utility meter reader.

The following review of the evidence is intended as a supplement to the discussion of adverse impact and the standards for assessing evidence of content validity contained in Plaintiff United States' Pre-Trial Brief, pp. 3-16.

As an aide to the Court, we have attached as Appendix A to this Brief a key to the exhibits concerning adverse impact and the validity of the challenged examinations.

B. Personnel Board Test Construction Methods and Documentation

Miriam Hall, the Chief Examiner of the Personnel Board, testified that the personnel analysts relied upon Position Classification Questionnaires (PCQs) completed as part of the five-year Classification and Pay Study[1], the Job Specification,[2] a synopsis of the PCQs which appears in the Board's Classification and Pay Manual, and the Dictionary of Occupational Titles (DOT) in constructing examinations. These documents do not provide information about whether an individual needs to be able to perform job tasks at entry into the position or whether the individual is trained on the job. Nor is such information provided concerning the knowledges, skills and abilities needed to perform the job tasks. Further, the documents provide little data on the relative importance of the job tasks other than an employee's indication of the amount of time he or she spends performing a task. No information is provided about the criticality of a task or about whether how an individual performs a task differentiates between the quality of the individual workers. As a general rule, Personnel Board technicians did not meet with job incumbents or systematically observe their work as part of the test construction process. An unstructured meeting with depart-

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1 A blank Position Classification Questionnaire is included in Chapter I of the Analyst's Manual, D-X-366.

2 The Job Specifications appear as Exhibit No. 2 in the Content Validity Verification Reports, D-X-394 to D-X-411.

ment heads or supervisors served, as a general matter, as the only supplementation of the classification and pay data.

Ms. Hall testified that neither the PCQs, the Job Specification, nor the DOT constitute an acceptable job analysis; yet, there was no effort to supplement this data in a systematic way. Indeed, personnel analysts, as noted in the review of specific jobs, *infra*, appear to have relied almost exclusively on the Job Specification in preparing their preconstruction analyses.

Dr. Menne's[3] Job Analysis Guidelines, D-X-365, note that position questionnaires "should usually be accompanied by another data collection method. The open-ended questionnaire requires writing skill on the part of the person completing it; there may be an exaggeration of the work done; and responses may be difficult to read and interpret." D-X-365, pp. 6-7.

Dr. Erich Prien[4] criticized the Personnel Board's almost exclusive reliance on classification and pay data in constructing examinations. He noted, as did Dr. Menne, that employees have an incentive (increased pay) and, therefore, a tendency to exaggerate the amount and kind of work they perform when they complete forms used for classification and pay purposes. In addition, Dr. Prien testified that a job analysis conducted for test construction purposes needs to be more detailed than does an analysis conducted for classification and pay purposes. The knowledges, skills and abilities identified in the Job Specifications tend to be general, vague and not operationally defined. The statements are sometimes qualified by indicating that "considerable" knowledge is required. This practice has been criticized by Dr. Prien, and by Dr. Menne as well. D-X-365, pp. 23-25.

There is evidence that the participation of department heads in the test construction process served as an occasion for the private theory of the department head to contaminate the process. For example, this is especially true of the zoo director's involvement in constructing the animal keeper examination. See D-X-378, Attachment No. 1. Ms. Hall testified

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3 Dr. John Menne was the Personnel Board's expert witness on the testing issues.

4 Dr. Erich Prien was the Government's expert witness on the testing issues and the question of the validity of the high school and G.E.D. reqirement [sic].

that although the zoo director noted that employees learn about animal habits on the job, he believed that questions on high school biology would assess an applicant's interest in animals. At the zoo director's direction a reading comprehension section and a section attempting to assess an applicant's attitudes were included in the test, as well.

Department heads were also used to find out what books should be included on the reading lists for the examinations. For example, Ruth Corwin, a personnel analyst, testified at deposition that when she met with police chiefs prior to preparing a sergeant examination, the discussion of the sergeant's job was informal and general and that much of the discussion focused on what books should be in the reading list. P-X-163, April 7, 1977, pp. 9-17.

Documentation of the test construction process, to the extent it exists for tests constructed before 1977, is limited to what is called a "Preconstruction Analysis." Miriam Hall, the Chief Examiner of the Personnel Board, testified that the Board first began using the preconstruction analyis [sic] form in 1974. The preconstruction analyses that have been introduced by the Personnel Board appear in Examiner's Manuals as Attachment No. 1. The following chart identifies the preconstruction analyses that are in the record.

Job Title	Exhibit	Date(s) of Analysis
(1) Account Clerk	D-X-375	11/15/74 2/20/76
(2) Accountant/Auditor	D-X-376	3/3/75
(3) Animal Control Officer	D-X-377	5/20/76
(4) Animal Keeper/Zookeeper	D-X-378	5/24/74
(5) Inter. Clerk	D-X-384	1/27/75
(6) Police/Sheriff Sgt.	D-X-385	3/20/75
(7) Secretary	D-X-387 P-X-123, p. 15	12/19/74 6/17/77
(8) Senior Clerk	D-X-388	9/2&3/75

There have been no preconstruction analyses introduced for tests in the following job classes: (1) automotive mechanic; (2) bailiff; (3) engineering aide; (4) heavy equipment operator; (5) housing inspector; (6) revenue examiner; (7) senior recreation leader; (8) sewage plant operator; (9) stenographer/intermediate stenographer; and (10) utility meter reader.

The preconstruction analysis documents contain three forms. On Form I, the personnel analyst identifies the job tasks, and the knowledges, skills, abilities and personal characteristics (KASPCs) required for the job. Ms. Hall testified that the analysts did not attempt to identify the perceived linkages between KASPCs and the job tasks identified on Form I. Form II is identified as a "Weighting Form;" the personnel analyst notes the test budget on this form. Form III contains a more detailed breakdown of the test budget. None of the forms adequately explain the rationale for the weighting of the various KASPCs in the test budget.

As a general rule, items on the challenged examinations are derived from textbooks. The Personnel Board developed a reading list for the respective examinations; to the extent they are in the record, they appear as Attachment No. 2 in the Examiner's Manuals. Miriam Hall testified that her office maintains an item bank keyed to individual textbooks that have been used to develop items in the past.

Both Dr. Menne and Dr. Prien testified that it is poor practice to derive items from textbooks for exams developed by a content strategy. The danger is that the items would reflect the content of the textbook more than they reflect the content of the job. Dr. Prien noted the potential for constructing tests to fit chapters in textbooks, rather than the identified job elements. Dr. Menne noted that the practice of supplying reading lists to applicants and then developing exams based on the reading lists may lead to test results that do not provide data on which applicants possess more knowledge of the information needed to perform the job. Such a test, he testified, may actually measure which applicants actually studied the textbooks — and the textbooks may or may not relate to the job.

Miriam Hall testified that, subject to approval by the Personnel Board Director, the chief examiner has authority to determine what kinds of selection procedures to use. The chief examiner, therefore, determines whether to use a paper-and-pencil test, a performance test, an oral interview, an assessment center, a training and experience rating or a combination of the above. In all of the job classes, except stenographer/intermediate stenographer,[5] ranking on the eligibility lists was deter-

5 Rank order on stenographer and intermediate stenographer eligibility lists was determined by a combination of scores on the written test and the dictation test. D-X-393, Tab 17.

mined solely by an applicant's score on a written test in entry-level positions. In promotional jobs, rank on the eligibility lists was determined by an applicant's test score combined with points awarded to the applicant for each year of classified service.

The Personnel Board certifies applicants to appointing authorities based solely on their rank on the eligibility list, with the highest ranked applicant being certified first. The Board does not provide guidance to appointing authorities on how to assess applicants during any oral interview they might conduct. The Personnel Board does not use a selection procedure to assess during the probationary period KASPCs that were not tapped by the various written tests, according to Ms. Hall's testimony.

The documentation of how passing points were determined, to the extent it exists, appears in the Examiner's Manuals as Attachment No. 8, following the 11-page discussion entitled "The Flexible Passing Point". The documentation reveals that, as a general matter, the decision on a passing point was based largely on the number of vacancies in the job class. See *e.g.*, Examiner's Manual for Police/Sheriff Sergeant Classification, D-X-385, Attachment No. 8, dated 4/29/75.

C. The Content Validity Verification Reports

The Menne method of marshalling evidence concerning content validity is described in D-X-365 and D-X-366. Both Dr. Menne and Dr. Prien agree that the method described in those documents is essentially a content-oriented test construction method. Nevertheless, the method was used by the Personnel Board to "verify" the content validity of previously administered tests — tests which were constructed using the methodology described in the preceding section of this Brief. Dr. Prien described such use of content-oriented test construction method as a departure from professional convention. See *infra*, Section I.E.

The Menne method calls for a personnel analyst to identify the job domains and the knowledges, abilities, skills, and personal characteristics (KASPCs) needed to perform those job domains. The work of the personnel analyst is subjected to review by subject matter experts (SMEs) — incumbents and supervisors who are experts about the job being analyzed. SMEs perform their review by completing a Job Analysis Questionnaire (JAQ). The JAQ calls for SMEs to rate and rank the

domains and KASPCs, to rate the test items, and to identify the linkages between KASPCs and domains and between test items and KASPCs. In addition, the JAQ asks SMEs to assess the difficulty of the exam as compared to the difficulty of the job.

Personnel Board employees Jerry Burchfield, Dwight Holsomback and Peter Tyler were primarily responsible for writing the domain and KASPC statements, conducting the SME sessions, reviewing the data generated by the SMEs and writing the reports of findings contained in the content validity verification reports.

The analysts relied on the Position Classification Questionnaires (PCQs), the Job Specification, the Dictionary of Occupational Titles (DOT), and other data available in the classification and pay files in writing the domain and KASPC statements. These are essentially the same documents the Personnel Board had been using to construct the challenged examinations. See Section I.B., *supra*.

Dr. Prien criticized the practice of compiling separate task statements into a composite domain statement. He testified that when separate task statements are lumped together, the SMEs' ratings became less helpful because it is more difficult to isolate what it is that the SMEs are rating. For example, one of the domains in the Secretary Report, D-X-406, Exhibit 4, D-1, uses three different action verbs: "composes, types and distributes a wide variety of material. . ." The SMEs were, therefore, never asked to rate each of these discrete tasks separately and their basis for rating the composite domain is unclear.

Dr. Prien testified that as a general matter it is preferable to have task statements reviewed and rated by SMEs before KASPC (or job element) statements are derived. The identification of KASPCs is based upon inferences about underlying worker characteristics that are needed to perform the job tasks. In order to shorten the "inferential leap" involved, a job analyst should obtain as much information about the job as possible. If the analyst meets with SMEs and discusses or has SMEs rate the job tasks, then the analyst will have a more complete understanding of the job before writing KASPC statements. As a result, the analyst will be less likely to develop KASPCs for tasks that are not performed or that are not required to be performed at entry into the job.

Dr. Prien criticized the way in which KASPC statements were written. He testified that many of the KASPC statements

are not "specific" as required by Division 14 of the American Psychological Association in its "Principles for the Validation and Use of Personnel Selection Procedures," p. 10, or "operationally defined" as required by the Uniform Guidelines on Employee Selection Procedures, P-X-25, Section 14(c)(4). The purpose of the operational definition requirement also is to reduce the "inferential leap" between tasks and KASPCs. In addition, a more specific KASPC statement gives the item-writer more information about what should be assessed and at what level of difficulty; it, therefore, limits the item-writer's discretion and provides more control and integrity to the test construction process. An added concern in this case is that vague, poorly-worded, composite, and duplicative KASPC statements make the item to KASPC linkages made by the SMEs less reliable than they otherwise could have been. As Dr. Menne testified, it is easier to link an item to a vague, ill-defined KASPC statement than to a specific one. Trial Transcript, p. 914, lines 13-16.

Account Clerk, D-X-394, Exhibit 5, is an example of a report that contains poorly-worded KASPC statements. For example, K-2 is defined as "knowledge of accounting principles and practices." A similar statement appears in the Accountant/Auditor Report, D-X-395, Exhibit 5, K-1; yet, the degree and kind of knowledge needed to perform the two jobs are probably not the same. An account clerk SME and an accountant SME may both respond positively to such statements but understand the statements differently. Another problem with the account clerk KASPC statements is that many of them were taken directly from the job specification, D-X-394, Exhibit 2, indicating that the analyst did not arrive at the statements through an independent analysis.

The domain and KASPC statements were reviewed by SME panels of varying sizes. Both Dr. Menne and Dr. Prien agree that a panel of eight to twelve SMEs will generally provide meaningful statistics concerning rater agreement and a sufficient number of views about the job. Dr. Menne testified that in heterogeneous jobs it is wise to try to get more SMEs involved. Dr. Prien testified that a panel of fewer than six SMEs should not be used unless there are no other SMEs available.

Page eight of the Content Validity Verification Reports identifies the number of SMEs participating in the study and the

number and location of incumbents in the position being studied.[6] Six or fewer SMEs were used in the following studies:

Job	Exhibit No.	No. of Incum-bents	No. of SMEs Reviwing Job Data	No. of SMEs Reviwing Test(s)
Animal Keeper	D-X-397	18	5	5
Bailiff	D-X-399	27	4	4
Police/Sheriff Sgt.	D-X-404	231	28	5 or 6
Rev. Exam	D-X-405	13	6	6
Secretary	D-X-406	50	8	3 or 5
Senior Clerk	D-X-407	77	17	5 or 6
Senior Rec. Ldr.	D-X-408	10	5	5

The JAQ Booklet contains rating scales for domains, KASPCs and test items. SMEs are asked to rate domains on a five-point scale (0-4) on five factors: factor A concerns frequency, factor B concerns time spent, factor C concerns criticality, factor D concerns the extent to which performance of the domain is necessary upon entry to the job, and factor E concerns the relationship performance of an individual domain has to successful performance of the job. KASPCs and items are rated on a four-point scale (1-4).

Dr. Menne testified that there are some problems with some of the rating scales. Factor C, Criticality/ Consequence of Error, does not provide SMEs with an option to rate a domain that is performed as not critical. The scale moves from "(0) not applicable; not performed" to "(1) slightly critical." SMEs may also rate a domain as moderately critical, critical or very critical. Leaving aside the question of whether there are degrees of criticality, the scale's utility is limited because SMEs must indicate that a domain that is performed is critical to some extent.

The KASPC scale poses a different problem. As Dr. Menne testified, the KASPC rating scale is not really a scale. Rather it is a set of categorical responses. In addition, the KASPC rating scale and factor D of the domain rating scale both seem to seek SMEs [sic] judgments about the extent to which a particular KASPC or performance of a domain is required upon entry into a position, yet, the "scaled" responses differ.

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6 The studies do not provide data on the number of supervisors of incumbents in the job being reviewed.

The analysis of the judgments of the SMEs is contained in the Report of Findings section of the Content Validity Verification Reports. All of the reports were written by either Mr. Burchfield, Mr. Holsomback or Mr. Tyler, with the exception of the revenue examiner report which was written by Dr. Menne.

The Personnel Board analysts testified that they reviewed the computer printouts of the SME responses to look for negative responses. A negative response was defined as a response indicating that a domain was not performed (a "0" rating on the five factors), a KASPC was "unnecessary" (a "1" rating on the KASPC rating scale), or a test item was "unrelated" (a "1" rating on the Item Rating Scale).

Mr. Burchfield testified that of the five domain factors, he focused his attention on factors A (frequency), B (time spent), and C (criticality). Trial Transcript, p. 1032, lines 8-12. Mr. Holsomback testified that when he reviewed domain ratings, he did not differentiate between a "2", "3" or a "4" rating on the scales. As a result, as long as some of the SMEs indicated that a domain was part of the job the analysts were reviewing, they treated the domain as an appropriate subject for assessment on the challenged examinations.

Mr. Holsomback testified that his review of the responses on the KASPC rating scale focused on whether a majority of the SMEs gave the KASPC a "1" rating ("unnecessary"). If he found that [a] majority of the SMEs rated a particular KASPC as unnecessary, then he would conclude the KASPC was inappropriate for assessment. As with the domain ratings, the analysts did not consider mean ratings of the KASPCs, nor did they treat a "2" rating (desirable: not required) differently than a "4" rating (necessary at entry).

SMEs were asked to link each KASPC to the domain statement(s) for which application of that KASPC is required. The analysts considered that a linkage between a KASPC and a domain was established if one SME linked a particular KASPC to a particular domain.

SMEs were also asked to rank the domains and the KASPCs separately based upon importance. The analysts relied upon these rankings in their reports, frequently noting that they considered that ranking provides the clearest picture of importance. Dr. Prien testified that the ranking operation eliminates any relationship to an absolute scale. As a result, low-rated

domains or KASPCs could be considered important because they were ranked highly. See *e.g.*, Engineering Aide, D-X-400 and Sewage Plant Operator, D-X-409, instances where domains were rated low.

On the item rating scale, the analysts focused their attention on whether a majority of the SMEs gave an item a "1" rating (unrelated). If a majority of the SMEs gave an item a "1" rating, the item was considered unrelated. If only half of the SMEs gave an item a "1" rating, the item was not considered unrelated unless the analyst's review of the item led him to the same conclusion.

The SMEs were also asked to link each item that did not receive a "1" rating to the KASPC to which the item was related. The analysts considered an item to assess a KASPC as long as one rater linked a specific item to a specific KASPC. The analysts used this data to identify KASPCs that were not assessed by the examination. A KASPC was considered to be not assessed by the examination if it was not linked by at least one rater to one item. The reports conclude generally that KASPCs not assessed by the written exam could be assessed during the probationary period. But Ms. Hall testified that the Personnel Board made no effort to see that this was done. Indeed, it would have been impossible to do so since the unassessed KASPCs were not identified until some time after the exams were administered.

The Reports of Findings indicate that the analysts made no effort to determine the extent to which the various KASPCs were assessed by the exam. This is so, despite the fact that Dr. Menne and the analysts agreed that it is important for the high-ranked KASPCs to be given more weight on the exam than the low-ranked KASPCs.

D. Dr. John Menne's Grades and Notes

Dr. Menne testified during the October segment of this trial that he and his wife, who is also a psychologist, reviewed the data concerning the validity of the challenged examinations and attempted to link items on the challenged examinations to KASPCs that he determined to be in the "certification domain". The "certification domain" was comprised of KASPCs that Dr. Menne believed could be assessed by a paper-and-pencil test. Their efforts to link items to KASPCs are reported in P-X-124.

Dr. Menne assigned a letter grade, based upon a conventional college grading scale ("A" through "F"), to the evidence

of validity of the examinations in each job class. The grades are listed in P-X-122.

E. Dr. Erich Prien's Analysis of the Content Validity Verification Reports

Dr. Prien testified that the Personnel Board's test construction methods, discussed in Section I.B., *infra*, do not comport with professional standards and federal guidelines. The basic defect of the test construction method was the failure to perform a complete and thorough job analysis and to derive a test budget from such a job analysis.

The Personnel Board, however, has applied the Menne method of content-oriented test construction in an attempt to "verify" the validity of previously administered tests — tests which were constructed using an entirely different methodology. The job analysis conducted pursuant to the Menne method and documented in the content validity verification reports did not serve as the basis for constructing any of the challenged tests which were used prior to 1977. As a result, the claim of content validity rests on evidence that the previously administered tests are consistent with the findings of the job analyses conducted pursuant to the Menne method between 1976 and 1978.

Dr. Prien testified that he made an effort to accommodate and evaluate the attempted *post hoc* "verification" of the content validity of the challenged examinations. In an attempt to assess the fit between the judgments of the SMEs and the challenged examination, Dr. Prien developed a retranslation analysis. A retranslation analysis starts with the test items and moves backward to KASPCs and then to domains. (In test construction, the movement would be from domains to KASPCs to a test budget to test items.) The retranslation analysis assessed whether the test items were linked by a consensus of SMEs to KASPCs which were important and necessary at entry; and whether those KASPCs were linked by a consensus of SMEs to domains that were important and required to be performed at entry.

Dr. Prien utilized a standard for rater consensus on linkages between items and KASPCs and between KASPCs and domains which were based upon a binomial probability model. See P-X-186. The purpose of the probability model was to determine whether the SME linkages exceeded chance expectancy.

C. Terrence Ireland, Ph.D., a professor of statistics who was qualified at trial as an expert in that field, testified about Dr. Prien's binomial probability model for rater consensus. P-X-186 articulates the probability model and sets forth the rater consensus standards justified by that model.

The major features of the model include defining an item as linked to a KASPC whose identity is not specified *a priori*, if the underlying and unknown probability of the KASPC's selection by raters, who are assumed to be similar, exceeds .5. Accordingly, the null hypothesis is that no KASPC has the expectation of being selected by more than half of the raters. Since the purpose of the validation procedure is to prove items good, the acceptable risk of accepting a bad item as good is defined, while the acceptable risk of rejecting a good item is undefined. The probability level for rejection of the null hypothesis is .05.

The model can be applied to KASPC to domain linkages as well as to item to KASPC linkages, except for a qualification which is applicable in this case. That exception is that the model assumes that a rater can link an item or KASPC to only one KASPC or domain, whereas defendants' raters were allowed to link a KASPC to more than one domain. The fact that more than one domain linkage was allowed has the effect of making the numerical standard for rater consensus more lenient than it was designed to be. That is, domain linkages will occur, by chance, more than 5% of the time.

The final assumption of the binomial probability model is as follows: "(8) More than one KASPC with probability of selection near 0.5 is unlikely to occur." Dr. Ireland was asked about this assumption during cross-examination. He testified that applying the model when assumption (8) was violated would be the equivalent of using a one-tail test in a two-tail situation. In other words, the model's approximately .05 probability of the threshold number of raters selecting a KASPC would be doubled to approximately .10, making the test for chance agreement more lenient than it was designed to be.

As noted earlier, the retranslation analysis required more than just a linkage that exceeded chance probability between an item and a KASPC and a KASPC and a domain. The items must be linked to important KASPCs which are necessary at entry into the job, and the KASPCs that meet that standard must be linked to domains that are required to be performed at entry into the

job. The KASPC rating scale and factor D of the domain rating scale asked the SMEs to make judgments about whether specific KASPCs or specific domains were required at entry into the job.

Dr. Prien decided to require that a KASPC or a domain receive a 3.0 mean rating[7] or higher on the appropriate rating scale in order to be considered necessary or required before entry into the job. The definitions of the responses on factor D, Extent Necessary Upon Entry to the Job, indicate that only ratings of "3" or "4" indicate that performance of the domain is necessary, to some extent, upon entry to the job.[8] On the KASPC rating scale, only a "4" response indicates that a KASPC is necessary at entry.[9] A "3" rating indicates that although the KASPC is necessary at full performance, it "can be and/or usually is gained through some form of training after entry." A "2" rating indicates that although the KASPC is desirable, it is not required. In addition, the requirement of at least a 3.0 mean rating on these scales is justified by recent experiments reported in the professional literature. Dr. Prien testified that the studies indicate that individuals respond to a numerically-scaled rating form based upon a general judgment concerning the question posed, regardless of how the scaled responses are defined. The standards for domain and KASPC ratings set by Dr. Prien are, therefore, reasonable in light of the way the scales have been defined and experimental studies of how individuals respond to numerical rating scales.

Dr. Prien noted that to the extent that there were poorly-worded KASPC statements, data on SME judgments of item to KASPC linkages may have been contaminated. It may be easier for an SME to link an item to a vaguely worded KASPC; and

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7 Mean ratings were used because the computer printouts contained mean ratings. Dr. Prien testified that median ratings could have been used, as well. P-X-168 through P-X-185 reflect the computation of median ratings and the performance of various retranslation operations using median ratings.

8 A "2" rating is defined as: "Desirable; it will shorten an otherwise lengthy training period." The scale does not indicate what constitutes a "lengthy training period" or whether incumbents receive training on the job regardless of the length of the training period. Cf. the definition of "Desirable" on the KASPC rating scale.

9 It is for this reason that Columns 3A-3G on Government Exhibit 168-185 analyze SME linkages considering only KASPCs with 3.5 or higher median ratings.

KASPCs worded similarly may cause SMEs confusion in performing the linkage operation. As a result, the retranslation analysis was hampered somewhat by deficiencies in the job analysis data.

Both testing experts discussed the ability of SME to link items to KASPCs. Dr. Prien testified that SMEs can be trained to perform that operation adequately. Dr. Menne testified that SMEs were not capable of making linkages between items and KASPCs even though the JAQ asked SMEs to perform that operation and Dr. Menne's article, D-X-366, after Appendix III, does not speak of any such limitation on SMEs' capabilities. Indeed, both Dr. Menne's article and the other article in D-X-366, written by Ottemann and Chapman, suggest that rater consensus on item to KASPC linkage should be assessed. See Menne, Menne and McCarthy, pp. 392 and 394; and Ottemann and Chapman, pp.21-22. In any event, the linkage operation performed by SMEs constitutes the only data relating the test items to the job analysis contained in the verification report.[10]

Dr. Menne testified that the face validity of an item — the degree to which an item bears a seeming relation to the job — affected SMEs' judgments on the item rating scales. Nevertheless, he testified that SMEs were capable of judging an item to be unrelated to the job, a "1" rating on the scale. SMEs' judgments that an item was unrelated were heeded only if a majority or, in some circumstances, half of the SMEs gave the item a "1" rating.

The defendants' reliance on this standard to support the claim of content validity produced anomalous results. For example, on the animal control officer exam, a majority of the SMEs rejected only four of the 105 items, D-X-396, pp.17-18; yet, Dr. Menne found that 80 of the 105 items were not job related and could not link an additional 16 items to KASPCs in the verification report, P-X-124. Dr. Menne gave the evidence of validity a grade of D, P-X-122, but reliance solely on the item ratings would have lead [sic] to a different and erroneous conclusion. It cannot be assumed that an item that was not rejected by a majority of SMEs is appropriate and job related.

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10 The Government was not aware of Dr. Menne's efforts to link items to KASPCs until he testified about that effort during the October segment of the trial.

Dr. Prien testified that in assessing item to KASPC linkages he often employed, on an exploratory basis, a consensus standard more lenient than that justified by the binomial probability model. P-X-131 is a summary exhibit that identifies the consensus standards which Dr. Prien applied to item to KASPC linkages and the number of items that survived application of each standard. In every instance, a significant number of items did not meet the retranslation standard. Dr. Prien testified that because so many items failed to meet the item to KASPC linkage standard, he did not assess KASPC to domain linkages, nor did he compare the distribution of the surviving items with a test budget justified by the domain and KASPC rating and ranking data.

A complete retranslation analysis, applying various consensus standards and various controls on linkages and KASPC and domain ratings, has been performed by the Government. The analysis is described in P-X-165 through P-X-167; the results of the analysis performed for each job appear in P-X-168 through P-X-185. Attached as Appendix B to this Brief is a chart that summarizes the results obtained by the various retranslation standards utilized in P-X-168 through P-X-185.

F. Test Equivalence

Dr. Menne testified that based upon his experience in the field of educational measurement, he believed that scores on an exam with a number of non-relevant items would correlate highly with scores on a revised exam. In Chapter 10 of the Analyst's Manual, D-X-366, he wrote:

> In most situations it can be shown that 5 percent or even 10 percent of items that are 'unrelated' does not meaningfully effect [sic] the validity of the test score. Obviously though, such items should no longer be employed in a selection procedure mainly because it is desirable to have tests as good as possible and not waste applicants' time on inappropriate items.

D-X-366, Chapter 10, p. 15.

In addition, Dr. Menne testified that the grades he assigned to the evidence of validity of the various exams reflected his belief about the degree to which selection decisions might have been different if the non-job related items had not been included in the test score. His testimony is not clear on the issue of how many bad items can be found in an exam and still not affect selec-

tion decisions enough to make the exam inappropriate for use. Some light is shed by his responses to the evidence concerning the animal control officer exam. He found 80 of the 105 items (76.2%) on the test were not job-related (P-X-124), yet, he refused to testify that the exam was not content valid.

The only evidence presented by the Personnel Board to support Dr. Menne's assertion about the number of bad items on an exam that can be tolerated is contained in D-X-413. That exhibit contains some incomplete data on the effect of rescoring a few of the challenged examinations[11] after eliminating some items.

Leaving aside the question of whether the standards used for item retention were appropriate, the exhibit is seriously flawed. Dr. Prien testified that the hypothesis to be tested concerns whether selection decisions would have been different if the "bad" items were not considered in arriving at test scores. To assess this hypothesis, it would be necessary to recompute the scores of *all* test takers in order to determine whether the rank order would be different *and* whether individuals who passed the original version of the test would have failed the revised version of the test and vice versa. The computation of the correlation coefficients in D-X-413 appears to be based solely on the assessment of the differences in test scores of those individuals who passed the original test. Moreover, the correlation coefficients, by themselves, do not reveal whether there would have been differences in the selection of individuals.

In only two instances, stenographer and senior clerk, does the exhibit present an individual by individual comparison of rank based upon the original test score and the revised test score. Joseph Kerr, a Personnel Board witness, testified that the comparison on the senior clerk exam was limited to those individuals who were on the original eligibility list.

The data on the senior clerk exam demonstrates that the elimination of 30 items (20% of the original test) significantly affected the ranking of the 22 individuals on the eligibility list. For example, the exhibit shows that one applicant, Joy Elaine Cooper, ranked 4th on the original list but ranked 14th on the rescored list. Another applicant, Deborah Jackson, ranked 19th

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11 D-X-413 contains data on one stenographer exam, one senior clerk exam, one (or two) accountant/auditor exams, one secretary exam, and two housing inspector exams.

on the original list but ranked 8th on the rescored list. Since the Personnel Board certifies applicants based on their rank on the eligibility list, changes of the kind identified on the senior clerk exam would presumably have affected selection decisions.

In addition, as Dr. Prien testified, the comparisons between scores on the original exam and the exam minus some inappropriate items does not provide complete information. It cannot provide information about how applicants would have fared on a form of the examination in which the inappropriate items were replaced by an equal number of appropriate items.

Dr. Prien also testified that he had been involved in an experiment to assess whether two different tests administered to the same group of applicants would produce similar results. Dr. Prien has worked as a monitor of the selection procedures used by the United State Department of State to select foreign service officers. At one point, the Department was considering whether to use the Professional and Administrative Career Examination (PACE), an exam used by the federal government to select individuals for some professional positions. The PACE exam and the foreign service officer exam were administered to the same group of about 6000 applicants. The results were that about 85% of those applicants who passed the PACE exam would not have passed the foreign service officer exam and about 85% of those applicants who passed the foreign service officer exam would not have passed the PACE exam.

In conclusion, the Personnel Board has failed to demonstrate that inappropriate items could have been eliminated from the challenged exams without affecting the selection decisions based upon those exams.

G. Review of Evidence Concerning Specific Examinations

1. Account Clerk

The Personnel Board has used five slightly different paper-and-pencil tests to select account clerks since 1972. Four of these tests were reviewed by incumbents and supervisors as part of the content validity verification process. D-X-394. The fifth test, the one developed in 1977, is discussed in the Examination Chronologies. D-X-393, Tab 1.

The Examiner's Manual, D-X-375, contains two preconstruction analyses, one was completed in 1974 by Miriam Hall and the other one was completed in 1976 by Ruth Corwin. Aside from the "revision" for the 1977 test, D-X-393, Tab 1,

these are the only documents presented by the Personnel Board that purport to document how any of the examinations at issue were constructed.

Miriam Hall, the Chief Examiner of the Personnel Board, testified that the personnel analysts relied upon Position Classification Questionnaires (PCQs) completed as part of the five-year Classification and Pay Study, the Job Specification, a synopsis of the PCQs which appears in the Board's Classification and Pay Manual, and the Dictionary of Occupational Titles in constructing examinations. These documents do not provide information about whether an individual needs to be able to perform job tasks at entry into the position or whether the individual is trained on the job. Nor is such information provided concerning the knowledges, skills and abilities needed to perform the job tasks. Further, the documents provide little data on the relative importance of the job tasks other than an employee's indication of the amount of time he or she spends performing a task. No information is provided about the criticality of a task or about whether how an individual performs a task differentiates between the quality of the individual workers. As a general rule, Personnel Board technicians did not meet with job incumbents or systematically observe their work as part of the test construction process. An unstructured meeting with department heads or supervisors served, as a general matter, as the only supplementation of the Classification and Pay data.

A review of Form I of both the 1974 and 1976 preconstruction analyses, D-X-375, shows that the statement of job tasks and knowledges, skills and abilities was derived, if not copied directly (see 1976 analysis), from the job specification contained in the Classification and Pay Manual. Form II, which is entitled "Weighting Form," contains no explanation or justification for the weights assigned to the various knowledges, skills or abilities that the technician attempted to assess by means of the test. In 1974, bookkeeping and accounting questions comprised 25% of the test. In 1976, that topic accounted for 15% of the test.

The data contained in the Content Validity Verification Report, D-X-394, led Personnel Board analyst Dwight Holsomback to conclude that the account clerk position is "heterogeneous", D-X-394, p. 15. Indeed, of the eight subject matter experts, only four indicated that account clerks perform domains 3 and 4, five indicated that account clerks perform

domains 1 and 5, and seven indicated that account clerks perform domain 2. D-X-394, Exhibit 1-Domain Ratings. After receiving the computer printout, Mr. Holsomback made no systematic effort to review the degree of specialization by account clerks or the degree to which a classification problem might exist.

A review of the KASPC Statement in the Validity Study, D-X-394, Exhibit 5, led Dr. Erich Prien to conclude that the statements were not "operationally defined" as required by the federal guidelines. The cross-examination of Mr. Holsomback revealed that many of the KASPC Statements were taken from the Job Specification, D-X-394, Exhibit No. 2.

The following chart shows how the SMEs rated the domains on factor D, Extent Necessary at Entry:

	Based Upon Ratings of All 8 SMEs			Based Upon Ratings of SMEs Who Indicated That Domain Performed By Account Clerks		
Domain	Avg. Rating	Median Rating*		# SMEs	Avg. Rating	Median Rating**
1	1.4	.5		5	2.2	2.0
2	1.4	1.5		7	1.6	2.0
3	1.4	.5		4	2.8	2/4
4	1.4	.5		4	2.8	3.0
5	1.0	.5		5	1.6	2.0

* From P-X-168.
** From Dr. Menne's Notes, P-X-124.

Of the eight knowledges and five ability statements, six received less than 3.0 median ratings (K-1, K-2, K-3, K-4, K-7, A-5), P-X-168, and seven received less than 3.0 mean ratings (K-1, K-2, K-3, K-4, K-7, A-1, A-5). D-X-394, Exhibit 1-KASPC Ratings. Notably, all four statements concerning bookkeeping and accounting (K-1, K-2, K-3, A-1) received less than 3.0 mean ratings; three of those four statements (K-1, K-2, K-3) received less than 3.0 median ratings.

Dr. Prien applied the retranslation standard of six out of eight SMEs linking an item to the same KASPC and found that linkage was established on 26 out of 102 items on test No. 1, 26 out of 105 items on test No. 2, 21 out of 101 items on test No. 3, and 14 out of 96 items on test No. 4. P-X-131. Requiring that the items be linked to a KASPC with a 3.0 mean rating reduced the survival rate. See P-X-131.

The Government's analysis of the Content Validity computer tape, P-X-168, shows that no domain had a median rating of 3.0 or higher on factor D, factor E, or factors C, D, and E combined. As a result, no items on any of the four tests survived the standards imposed by 2B through 2G and 3B through 3G. (See P-X-165 for the definition of the various standards.) Imposing a requirement that five of the eight SMEs link an item to the same KASPC, P-X-168, column 2A, produced the following results: test No. 1, 38 out of 102 items survived; test No. 2, 38 out of 107 items survived; test No. 3, 35 out of 101 items survived; test No. 4, 24 out of 96 items survived.

Dr. Menne gave the evidence of validity a grade of B. P-X-122. Dr. Menne's notes reveal he attempted to link test items on two of the exams to KASPCs in what he defined as the "certification domain." P-X-124. The following chart, taken from P-X-124, shows the linkages made:

		Test 12/74	Test 8/76
	A2		
	K6	47	30
	K1	23	29
	K5	3	
	K8		
	K3		
	K4	3	18
	A1		
	K2	10	1
	K7		1
Subtotal		86	79
no linkage		11	5
marginal		1	
poor			1
not job related		1	10
Total		99	95

If we eliminate the KASPCs that received median ratings below 3.0, K-1, K-2, K-3, K-4, K-7, A-5, then on the December 1974 test Dr. Menne was able to link only 50 of the 99 items to appropriate KASPCs and on the August 1976 test he was able to link only 30 of 95 items to appropriate KASPCs.

The SMEs were asked to assess the difficulty of the examinations in regard to the difficulty of the job. Job Analysis

Questionnaire (JAQ) Booklet, p. 46, question 3. Six of the eight SMEs rated the exam to some extent harder than the job.

Miriam Hall testified that in 1977 she reviewed the Content Validity Verification Report before preparing an examination. She testified that she did not review the weighting of the exam in light of the SME responses. The only changes she made to the 1976 examination were to delete nine items and to revise 5 other items. There was no testimony that she analyzed the heterogeneity of the account clerk position.

Dr. Prien testified that the evidence presented did not support a conclusion that the examinations in question were content valid in light of professional standards and federal guidelines.

2. Accountant/Auditor

Between 1972 and 1978, the Personnel Board used two versions of a paper-and-pencil test to select accountants and auditors. The test used from 1972 through 1974 contained 50 items and a "problem segment." The test used from 1975 through 1978 contained 53 items and a "problem segment." D-X-393, D-X-376, D-X-395.

The Examiner's Manual, D-X-376, does not contain a preconstruction analysis for the examination used from 1972 through 1974 nor any other documentation of how that examination was constructed. There is a preconstruction analysis dated March 3, 1975, completed by Ruth Corwin, concerning the exam used from 1975 to 1978.

Miriam Hall, the Chief Examiner of the Personnel Board, testified that the personnel analysts relied upon Position Classification Questionnaires (PCQs) completed as part of the five year Classification and Pay Study, the Job Specification, a synopsis of the PCQs which appears in the Board's Classification and Pay Manual, and the Dictionary of Occupational Titles in constructing examinations. These documents do not provide information about whether an individual needs to be able to perform job tasks at entry into the position or whether the individual is trained on the job. Nor is such information provided concerning the knowledges, skills, and abilities needed to perform the job tasks. Further, the documents provide little data on the relative importance of the job tasks other than an employee's indication of the amount of time he or she spends performing a task. No information is provided about the criticality of a task or about whether how an individual performs a task differentiates be-

tween the quality of the individual workers. As a general rule, Personnel Board technicians did not meet with job incumbents or systematically observe their work as part of the test construction process. An unstructured meeting with department heads or supervisors served, as as general matter, as the only supplementation of the classification and pay data. In this case, the Examination Chronology, D-X-393, Tab 2, p. 2, states that the Personnel Board technician relied, in part, on the judgment of her husband, an accountant who did not work for any of the jurisdictions served by the Personnel Board.

Form I of the preconstruction analysis sets out the job tasks and knowledges, skills, abilities and personal characteristics required for the job of accountant. The data listed under the column entitled "Job Tasks" appear to have been copied directly from the Job Specification listing of "Examples of Work". The knowledges and abilities listed on the preconstruction analysis also appears to have been copied directly from the Job Specification.

Miriam Hall testified that the problem segments on the exams came from textbooks and were not actual job samples.

The Content Validity Verification Report identifies 10 domain statements. D-X-395, Exhibit 4. Nine incumbents and supervisors participated in the study. The following chart notes the number of SMEs who indicated that a particular domain was part of the job:

Domain	Total SMEs	SMEs Who Consider Domain Part of Job*
D-1	9	3
D-2	9	3
D-3	9	9
D-4	9	6
D-5	9	9
D-6	9	5
D-7	9	3
D-8	9	7
D-9	9	0
D-10	9	6

* Based upon D-X-395, Exhibit 1-Domain Ratings.

The data suggest a classification problem. Indeed, Dr. Menne's notes, P-X-124, Accountant/Auditor, p. 7, state that there is a "*Classification Problem*!" (emphasis in original).

The Report of Findings of the Validity Study asserts that "personnel are expected to be interchangeable within the class and persons laterally transferred would be expected to perform all types of accounting tasks." D-X-395, p. 17. The Personnel Board introduced no evidence that accountants and auditors are, in fact, laterally transferred from positions with one set of duties to positions with another set of duties.

The Validity Study identifies 16 knowledge statements, 3 ability statements and four skill statements. D-X-395, Exhibit 5. The statements are general, not operationally defined and duplicative. The duplication indicates that the Personnel Board analyst was confused about the distinction between a knowledge statement, an ability statement and a skill statement. See Uniform Guidelines, Section 16(A), (M) and (T). For example, K-1, A-1, and S-1 are general statements concerning accounting principles that appear to be similar. Not surprisingly, the SMEs rated and ranked the general KASPCs concerning accounting principles highly. Their ratings did vary somewhat; K-1 received a 4.0 median rating, whereas A-1 and S-1 received 3.0 median ratings. P-X-169.

Another example of duplication is K-5 and S-2, both of which concern math and are defined in nearly identical language.

As a result of these deficiencies, the job analysis contained in the Validity Study is not very informative. It tells the reader that "knowledge of all the types of accounting principles and procedures" (K-1) is necessary for an individual to perform the job of accountant and auditor. Dr. Prien testified that a statement of that kind does not provide sufficient guidance to the item writer. In addition, the linkage of items to such an element is relatively easy and automatic but provides little information about the appropriateness of the test item.

Dr. Menne's linkage of items to KASPCs demonstrates this phenomenon. On one test, he linked 45 of 50 items to K-1; on the other test all 50 items were linked to K-1. P-X-1. Nevertheless, Dr. Menne gave the evidence of validity a grade of B-. P-X-122.

An analysis of the mean item ratings show [sic] that a substantial number of items received mean item ratings of 2.4 or lower. On test No. 1, 29 of the 50 items (58%) received mean ratings of 2.4 or lower. On test No. 2, 20 of the 53 items (37.7%) received mean ratings of 2.4 or lower.

Dr. Prien testified that the evidence presented does not support a conclusion that the tests used between 1972 and 1978 were content valid in light of professional standards and federal guidelines. He did note parenthetically that the rationale for the 1979 test, D-X-393, Tab 2, p. 4, indicates that the Personnel Board followed an improved test construction process but that there was insufficient evidence for him to draw a conclusion about the content validity of that exam. In any event, the 1979 examination is not in issue in this litigation.

3. Automotive Mechanic

The Personnel Board has used four versions of a 150 item paper and pencil test to select automotive mechanics between 1972 and 1978. D-X-398, p. 19; D-X-393, Tab 5.

The Examiner's Manual, D-X-379, does not contain a preconstruction analysis or any other documentation of how the basic 150 item test was constructed. The Examination Chronology, D-X-393, Tab 5, p. 3, contains a very brief description of how the basic test was modified in 1978.

The Content Validity Verification Report, D-X-398, Exhibit 4, identifies 14 domain statements. Five of those statements received median ratings below 3.0 on Factor D, Extent Necessary At Entry (D-10, D-11, D-12, D-13, D-14). Seven statements received mean ratings below 3.0 on Factor D (D-4, D-8, D-10, D-11, D-12, D-13, D-14).

D-X-398, Exhibit 5, identifies 30 knowledge statements, three ability statements and one skill statement. The KASPC statements are fairly discrete. Of those 34 KASPC statements, 11 received mean ratings below 3.0 (K-7, K-10, K-15, K-17, K-19, K-23, K-24, K-25, K-26, K-27, K-28). D-X-398, Exhibit 1 - KASPC Ratings. Six statements received median ratings below 3.0 (K-10, K-15, K-24, K-26, K-27, K-28) P-X-172. In addition, K-23 and K-25 were not linked by a majority of the raters to the class of domains which received a 3.0 or higher median rating on factor D, Extent Necessary at Entry. P-X-172.

Dr. Prien criticized the way the KASPC statements were written. He testified that many of the elements that were written as knowledge statements should have been written as ability statements because they concerned the ability to perform an observable task. For example, statements which concern knowledge of how to do something (e.g. K-16, K-18) are more appropriately considered abilities. Dr. Prien testified that the

consequence of mislabeling job elements as knowledges is that a paper-and-pencil test would appear to be appropriate when, in fact, another kind of selection procedure should be considered.

The Uniform Guidelines, P-X-25, and the Questions and Answers, P-X-26, address the question of the propriety of using paper-and-pencil tests for jobs such as automotive mechanic. Section 14(c)(4) of the Uniform Guidelines states in part:

> The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

The Answer to Question 78 of the Questions and Answers states in part:

> Paper-and-pencil tests which are intended to replicate a work behavior are most likely to be appropriate where work behaviors are performed in paper-and-pencil form (e.g., editing and bookkeeping). Paper-and-pencil tests of effectiveness in interpersonal relations (e.g., sales or supervision), or of physical activities (e.g., automobile repair) or ability to function properly under danger (e.g., firefighters) generally are not close enough approximations of work behaviors to show content validity.

Dr. Prien testified that it would be possible and appropriate to use a small job sample test to select automotive mechanics.

Dr. Prien's summary exhibit, P-X-131, shows that six of the nine SMEs were able to agree on an item-KASPC linkage on 103 items on the 150 item test (68.7%), 88 items on the 127 item test (69.3%), and 87 items on the 125 item test (69.6%). If the standard is lowered to require agreement by only five of the nine SMEs, then 112 items on the 150 item test (74.7%) survive. P-X-172, Column 1 (Lax).

Dr. Menne gave the evidence of validity a grade of C+. His notes, P-X-1, indicate that he did not complete his attempt

to link items to KASPCs. He testified that he was concerned about the KR-21 values, because given the length of the test, the KR-21 values should have been .9 or higher.

Dr. Prien testified that the evidence of validity does not support a conclusion that the exams were content valid in light of professional standards and federal guidelines.

4. Bailiff

Until 1974, the Personnel Board used a 75 item paper-and-pencil test to select bailiffs. Starting in 1974, the Personnel Board selected bailiffs from among those individuals who took Policeman Test 100 D-X-393 [sic] Personnel Board Analyst Jerry Burchfield testified that at least six persons who took the police officer test were certified for bailiff positions. Plaintiffs' Exhibit 60, III. 1976-1978, shows that all six persons hired as bailiff between 1976 and 1978 were white.

The Examiner's Manual, D-X-380, does not contain a pre-construction analysis or any other documentation of how the 75 item test was constructed.

Only four SMEs were used to perform a content validity study; page 8 of D-X-399 shows that there were 27 baliffs employed at the time. Dr. Prien testified that it was only acceptable to have an SME panel of four persons if there were no other SMEs available; the data obtained from a small SME panel may not be reliable.

The Content Validity Study identifies 14 knowledge statements, 14 ability statements, and four skill statements. D-X-399, Exhibit 5. Seven knowledge statements, three ability statements and two skill statements received median ratings below 3.0 (K-1, K-5, K-6, K-8, K-9, K-10, K-14, A-7, A-11, A-14, S-1, S-3). P-X-173. Eleven knowledge statements, three ability statements and three skill statements received mean ratings below 3.0 (K-1, K-2, K-4, K-5, K-6, K-7, K-8, K-9, K-10, K-13, K-14, A-7, A-11, A-14, S-1, S-3, S-4). D-X-399, Exhibit 1-KASPC Ratings.

The Report of Findings of the Validity Study, D-X-399, p. 17, states that 17 items were judged not related to their job by two of the SMES and 3 items were judged not related to their job by three SMEs. A majority, three out of four SMEs, indicated that only 55 items (73.3%) on the 75 item test were related to the job of bailiff.

Dr. Prien reviewed the item to KASPC linkage data in the computer printout and found that the four SMEs agreed on a linkage between five items and a particular KASPC. P-X-131. He also testified that if the standard were reduced to require only three of the four SMEs to agree on item to KASPC linkage, then only 15 items survived. When the standard is reduced to agreement between two of four SMEs, then 49 items survive. Dr. Prien testified that even using the 50% consensus standard, the number of items surviving was too small to support a claim of content validity.

Dr. Menne's notes, P-X-124, establish that he was only able to link 29 items to KASPCs in the "certification domain" and that he judged 30 items on the test to be "poor/not job related." Dr. Menne gave the evidence of validity a grade of C.

The Personnel Board presented no evidence concerning the validity of the use of Policeman Test 10C to select bailiffs. This Court has previously held that the Personnel Board failed to establish that Policeman Test 10C is related to the job of police officer.

Dr. Prien testified that the evidence presented does not support a conclusion that the examinations were content valid in light of professional standard and federal guidelines.

5. Engineering Aide

The Personnel Board used a 60 item math test to select engineering aides until September 1977. In September 1977, 28 items concerning surveying and 11 items concerning geometry and trigonometry were added to the 60 item math test. D-X-393, Tab 7.

The Examiner's Manual, D-X-381, does not contain a pre-construction analysis or any other documentation of how the test was constructed.

SMEs reviewed two different sets of domain statements. D-X-400, Report of Findings. Both sets of domain statements received low ratings on factor D, Extent Necessary Upon Entry

To the Job. The following chart shows the mean and median ratings of revised set of domains:

Domains	Mean*	Median**
D-1	1.4	1.0
D-2	2.1	2.0
D-3	1.1	1.0
D-4	1.1	1.0
D-5	1.6	2.0
D-6	1.7	2.0
D-7	0.9	0.0
D-8	0.2	0.0

* D-X-400, Exhibit 1-Domain Ratings.
** P-X-174.

Dr. Prien testified that in a case, such as engineering aide, where the SME ratings indicate that all the job duties are learned on the job, a criterion-related validity study is required to support the use of a paper-and-pencil test. A test that taps job tasks that are learned on-the-job cannot be supported by evidence of content validity.

The Content Validity Study identifies 3 knowledge statements, eleven ability statements and 2 skill statements. D-X-400, Exhibit 5. The following statements received median ratings below 3.0: K-2, K-3, A-4, A-8, A-9, A-10, A-11, S-1. P-X-173. The following statements received mean ratings below 3.0: K-1, K-2, K-3, A-4, A-6, A-8, A-9, A-10, A-11. D-X-400, Exhibit 1-KASPC Ratings. Notably, A-10 and A-11, the two statements concerning trigonometry and geometry received mean and median ratings below 3.0. In addition, a majority of the SMEs (five out of nine) were unable to link A-11 to any of the domains.

Dr. Prien's analysis of item to KASPC linkage shows that six or more of the nine SMEs agreed on the linkage of 47 items. P-X-131.

Dr. Menne gave the evidence of validity a grade of C. P-X-122. He testified about his concerns about the domains receiving low ratings on factor D and the test only tapping a limited number of KASPCs. His notes indicate that he was able to link each item on the test to a KASPC in the "certification domain". Six of the items, however, were linked to A-10 and A-11, ability statements which dealt with trigonometry and geometry and which received mean and median ratings below 3.0.

As noted earlier, the Examination Chronology for engineering aide states that 28 surveying items and 11 geometry and trigonometry items were added to the 60 item test in September 1977. D-X-393, Tab 7. Miriam Hall testified, however, that engineering aide was an entry-level position and that no prior surveying experience was required of applicants.

Dr. Prien testified that the evidence presented does not support a conclusion that the examinations were content valid in light of professional standards and federal guidelines.

6. Housing Inspector

The Personnel Board has used three different tests to select housing inspectors. During 1972, housing inspectors were selected based upon scores on the American Council on Education Psychological Examination (1953 edition), a "scholastic aptitude" test. Both Dr. Menne and Dr. Prien agree that use of this test to select housing inspectors cannot be supported by evidence of content validity.

In November 1972 and January 1973 two versions of a paper-and-pencil "job knowledge" test were used to select housing inspectors. The Examiners Manual, D-X-383, does not contain a pre-construction analysis nor any other documentation explaining how the two tests were constructed.

The Content Validity Verification Report is D-X-402. The Personnel Board analyst identified five domain statements. All five statements received low ratings on factor D, Extent Necessary At Entry. The mean and median ratings are as follows:

Domain	Mean Rating*	Median Rating**
D-1	2.4	2.0
D-2	2.1	2.0
D-3	2.3	2.0
D-4	1.5	1.5
D-5	1.8	1.5

* D-X-402, Exhibit 1-Domain Ratings.
** P-X-176.

A comparison of the KASPC Statements, D-X-383, Exhibit 5, with the Job Specification, D-X-383, Exhibit 2, shows that a number of the KASPC Statements were taken directly from the Job Specification. (See K-3, K-4, K-5, A-1, A-2, A-3)

Of the 13 knowledge statements and 5 ability statements, 6 knowledge statements received mean ratings below 3.0 (K-1, K-2, K-9, K-10, K-11, K-12). D-X-402, Exhibit 1-KASPC

Ratings. All the knowledge and ability statements received median ratings of 3.0 or higher. P-X-176.

Four or more of the eight subject matter experts rejected seven items on the 100-item test (Test No. 2 - November 1972) as being unrelated to the job. Four or more of the eight SMEs rejected 28 items on the 105-item test (Test No. 3 -January 1973) as being unrelated to the job. D-X-402, Exhibit 1-Items-Ratings. Thirty six items on the 105-item test received average item ratings below 2.0. D-X-402, Exhibit 1-Items-Distribution of Ratings.

Dr. Prien's summary exhibit, P-X-131, shows that six or more SMEs were able to agree on item to KASPC linkage for 30 items on the 100-item test and 32 items on the 105-item test.

The Government's analysis of the computer tape, P-X-176, shows that no items survive a standard which calls for items to be linked by a majority of SMEs to KASPCs with at least a 3.0 median rating which in turn are linked by a majority of SMEs to the class of domains with at least a 3.0 median rating on factor D. P-X-176, Columns 2B, 2C, 3B and 3C.

Dr. Menne's notes, P-X-124, show that he was able only to link 86 items on the 100-item tests and 71 items on the 105-item test to KASPCs in what he determined to be the "certification domain." Dr. Menne gave the evidence of the validity of the 100-item and 105-item tests a grade of C. P-X-122.

7. Intermediate Clerk

The Content Validity Verification Report, D-X-403, identifies a 70 item paper-and-pencil test used in 1971 and revised to a 100 item test used in three versions between 1972 and 1974, and two versions (done in 1975 and 1976) of a 99 item test used between 1975 and 1978, for selection of intermediate clerks. D-X-[illegible] Tab 10. The 70 item test, administered in 1971, has not been challenged by the Government and for that reason will not be discussed further.

There are three "Printouts" in the validity report, numbered 1, 2 and 3. Each contains a separate Report of Findings pertaining to two of the six tests or versions of tests. The three separate reports used panels of eight, nine and ten SMEs, respectively, for the rating of domains, KASPCs and items. Of course, the domains and KASPCs did not change, although their ratings by the three panels did vary. Defendants did not aggregate the

domain and KASPC data from the three panels; we have done so in P-X-177.

The Examiner's Manual, D-X-384, contains a preconstruction analysis completed by Marilyn Landers in January 1975. There is no documentation on how any of the exams administered before that date were constructed.

Miriam Hall, the Chief Examiner of the Personnel Board, testified that the personnel analysts relied upon Position Classification Questionnaires (PCQs) completed as part of the five-year Classification and Pay Study, the Job Specification, a synopsis of the PCQs which appears in the Board's Classification and Pay Manual, and the Dictionary of Occupational Titles in constructing examinations. These documents do not provide information about whether an individual needs to be able to perform job tasks at entry into the position or whether the individual is trained on the job. Nor is such information provided concerning the knowledges, skills and abilities needed to perform the job tasks. Further, the documents provide little data on the relative importance of the job tasks other than an employee's indication of the amount of time he or she spends performing a task. No information is provided about the criticality of a task or about whether how an individual performs a task differentiates between the quality of the individual workers. As a general rule, Personnel Board technicians did not meet with job incumbents or systematically observe their work as part of the test construction process. An unstructured meeting with department heads or supervisors served, in general, as the only supplementation of the classification and pay data.

The weighting of the test prepared by Landers in 1975, revised in 1976, and used from 1975 to 1978, is: 20% on vocabulary, 20% on business mathematics, 15% on filing, 20% on business English, of which half is grammar and half mechanics (punctuation, spelling and capitalization), 15% on letter writing, and 10% on clerical procedures. D-X-384, Preconstruction Analysis, Form II.

Eight domain statements are identified in the Content Validity Verification Report, D-X-403. Of the 27 SMEs, 24 indicated that D-8 was not performed by intermediate clerks, 12 indicated that D-4 was not performed, 11 indicated that D-6 was

not performed, and 10 indicated that D-7 was not performed.[12] D-X-403, Exhibit 1-Domain Ratings. D-4 and D-7 have to do with the keeping of fiscal records, D-6 with scheduling, and D-8 with administering tests. Three of these four domains (D-4, D-7 and D-8) were mentioned in one or more of the three Reports of Findings as receiving high ratings from the SMEs who indicated they were performed. The job class was characterized as "very heterogeneous" by the Report of Findings for Printout No. 1, both between jurisdictions and between departments within jurisdictions; and it was stated that "activities that some incumbents do not do may make up the bulk of another incumbent's job." D-X-403, Printout 1, p. 14.

The Personnel Board presented no evidence of a systematic effort to review the degree of specialization by intermediate clerks or the degree to which a classification problem might exist. Dr. Prien testified that when a job class is heterogeneous, evidence of content validity cannot justify the use of the same examination to assess all applicants unless: (1) successful applicants could be placed in any of the specialized or idiosyncratic positions, or (2) the job changed over time (e.g., seasonally) so that over a period of time all of the job duties tapped by the test would be performed by the individual; or (3) incumbents were routinely transferred from a position with one set of duties to a position with another set of duties. The Personnel Board did not present evidence that any of these factors existed in the intermediate clerk classification.

Of the eight domain statements, only D-8 (administering examinations) received a mean rating as high as 3.0 on factor D, Extent Necessary at Entry, and then only if the mean was computed by counting only the three out of 27 raters who said that domain was performed. D-X-403. Exhibit 1-Domain Ratings. Only D-1 (typing) and D-3 (answering telephone inquiries) received median ratings as high as 3.0 on factor D. P-X-177.

There are 46 KASPC statements for the intermediate clerk class. D-X-403, Exhibit 5. The statements are in many instances so vague as to be meaningless, for example: K-20, "knowledge of the interrelationship between job"; A-9, "ability to ascertain the interrelationships between departments"; K-3,

12 D-X-403, Printout 1, page 14 incorrectly states that one or two of the SMEs for that printout indicated D-7 was not performed. Three so indicated.

"knowledge of the basic fundamental operation of Government." The interrelationships and fundamental operations relating to those job elements are no where defined, and could be legal, organizational, sociological, or even geographic. Other examples of vague KASPC statements include K-11, "knowledge of the basic rules of public relations," which was ranked 16th, or in the top half of KASPCs, by the aggregated SME panel; A-12; "ability to perform simple routine tasks," which was ranked 13th, or in the top third; and A-13, "ability to learn new procedures," which was ranked 10th. Dr. Menne noted that "(o)n this test . . . the KASPCP [sic] statements are poorly worded." P-X-124.

There were 27 KASPCs which a majority of the 27 SMEs linked to either of the domains having a median rating of 3.0 on factor D: K-1, K-2, K-4, K-5, K-8, K-9, K-10, K-11, K-20, A-1, A-3, A-4, A-5, A-7, A-8, A-9, A-11, A-12, A-13, S-1, S-2, S-3, S-4, P-1, P-2, P-3, P-4. P-X-177. Of these, 22 KASPCs received median ratings of 3.0 or above: K-1, K-2, K-4, K-11, K-20, A-1, A-3, A-4, A-5, A-7, A-8, A-11, A-12, A-13, S-1, S-2, S-3, S-4, P-1, P-2, P-3, P-4. *Id.* Of these, A-1, A-3, A-5, A-7, A-8, A-11, A-12, A-13, S-1. P-1, P-2, P-3 and P-4 were excluded from the "certification domain" by Dr. Menne, leaving the following nine KASPCs in the "certification domain": K-1, K-2, K-4, K-11, K-20, A-4, S-2, S-3, S-4. P-X-124. Those KASPCs are shown below with their importance ranks according to the aggregated panel of SMEs, along with the numbers of items linked to each KASPC by Dr. Menne in P-X-124:

KASPC	Rank	100-Item Test	100-Item (30-B)	100-Item	99-Item
K-1	1	13	17	17	12
K-4	5	1	1	0	2
K-2	7	16	21	21	24
S-2	11	5	2	2	1
K-11	15	0	0	0	0
S-3	17	0	0	0	0
S-4	23	0	0	0	0
K-20	25	0	0	0	0
A-4	29	0	0	0	0
Total		35	41	40	39

Thus, Dr. Menne was able to link only about two-fifths of the intermediate clerk test items to KASPCs which were found to be in the "certification domain," have at least a 3.0 median

rating and be linked by a majority of the SMEs to the two domains that received a 3.0 median rating on factor D.

According to the job specification, which has been identified as underlying the 1975 preconstruction analysis, intermediate clerks were expected to type letters or other written materials "occasionally from own composition." The last phrase is repeated verbatim in Form I of the preconstruction analysis. Despite the admitted "occasional" nature of the writing of letters or other materials, a number of knowledges, skills or abilities are shown on Form I as associated with that task. These include "business English" and "vocabulary," which in the aggregate, according to Forms II and III, account for at least 40% of the 99-item tests. "Letter writing" accounts for another 15% of the items, for a total of 55% of each test.

The writing of letters is not mentioned in the domain statements in the validation study. References to that activity or to the knowledges, skills or abilities said to be associated with it do, however, reappear in certain of the KASPC statements in the same validation study. K-4, for example, is "knowledge of the English language as it pertains to composing letters and proofreading letters." That compound statement lumps the passive, mechanical task of proofreading with the more active and demanding one of writing, so that any importance which writing letters might have had by itself in the views of the SMEs is not ascertainable from the data on that KASPC. S-2, "skill in spelling and writing," and S-4, "skill in word usage and meaning," suffer from the same ambiguity. S-4 additionally lies in the bottom half of the KASPC rankings, 25th of the 46 KASPCs if the rankings of the three sets of raters are aggregated. D-X-403. A-4, "ability to compose business letters," lies in the bottom third of the KASPC rankings, 33rd of the 46 KASPCs. *Id.* K-8, "knowledge of word meaning," received a median rating of only 2.0. P-X-177. Thus, the task of writing letters, to which according to the preconstruction analysis up to 55% of the test items were intended to relate, was a task which the SMEs gave no evidence of performing; and KASPCs which might arguably have been related to that task result in no evidence that the writing task was commingled with more typically clerical elements, the KASPC did not receive high marks from the SMEs, or both.

Dr. Menne gave the evidence for validity of the intermediate clerk examinations a grade of B/B-. P-X-122.

Dr. Prien testified that the evidence presented does not support a conclusion that any of the tests used between 1972 and 1978 were content valid in light of professional standards and the federal guidelines.

8. Police Sergeant and Sheriff Sergeant

Between 1972 and 1978, the Personnel Board has administered seven versions of a multiple choice paper-and-pencil test to select sergeants. Five of those versions are reviewed in the Content Validity Verification Report, D-X-404, and the other two versions are discussed in the Examination Chronologies, D-X-393, Tab 11.[13]

The Examiner's Manual, D-X-385, contains a preconstruction analysis completed by Ruth Corwin in March 1975. There is no documentation on how any of the exams administered before that date were constructed. The Examination Chronology contains a "rationale" for the development of the 1978 examination. D-X-393, Tab 11.

Miriam Hall, the Chief Examiner of the Personnel Board, testified that the personnel analysts relied upon Position Classification Questionnaires (PCQs) completed as part of the five-year Classification and Pay Study, the Job Specification, a synopsis of the PCQs which appears in the Board's Classification and Pay Manual, and the Dictionary of Occupational Titles in constructing examinations. These documents do not provide information about whether an individual needs to be able to perform job tasks at entry into the position or whether the individual is trained on the job. Nor is such information provided concerning the knowledges, skills and abilities needed to perform the job tasks. Further, the documents provide little data on the relative importance of the job tasks other than an employee's indication of the amount of time he or she spends performing a task. No information is provided about the criticality of a task or about whether how an individual performs a task differentiates between the quality of the individual workers. As a general rule,

13 In August 1979, at the time the Government reviewed the documents underlying the Examination Chronologies, D-X-393, the Government requested the pass and hire rates, by race, for the sergeant examination administered on November 8, 1978. The Personnel Board failed to supply the requested data. As a result, the Government was unable to introduce evidence concerning the possible adverse impact of the 1978 examination. The issue of the validity of that examination is, therefore, not before the Court at this time.

Personnel Board technicians did not meet with job incumbents or systematically observe their work as part of the test construction process. An unstructured meeting with department heads or supervisors served, as a general matter, as the only supplementation of the classification and pay data.

Ruth Corwin, a Personnel Board analyst, testified at deposition about how she constructed the 1975 sergeant examination. P-X-163, April 7, 1977, pp. 5-75. She testified that she relied on the PCQs, the Job Specification and the DOT in preparing the preconstruction analysis. During the preconstruction process she never discussed the job of sergeant with an incumbent, *Id.*, p. 19 lines 14 to 17, nor did she systematically observe sergeants at work. *Id.*, p. 30, line 7 to p. 31, line 12.

Corwin attended a meeting with the then Chief Examiner, Eugene Williams, and some police chiefs. To the extent that the actual job duties of sergeants were discussed, it was done in an informal and general way. Much of the discussion concerned what textbooks should be on the reading list for the examination. *Id.*, pp. 9-17. She did not meet with any individuals who directly supervised sergeants. *Id.*, p. 19 line 18 to p. 20, line 8.

Corwin testified that Form I of the preconstruction analysis tracked the Job Specifications for police sergeant and sheriff sergeant. In addition, she testified that she did not "really attempt to match a knowledge and a skill and ability with the job task." *Id.*, p. 29 lines 5-6.

The weighting of the components of the examination was based on Corwin's judgment about the relative importance of the various job elements. The information about the importance of a job task or a knowledge, skill or ability was limited to the amount of time the PCQs indicated sergeants spent performing specific tasks. *Id.*, p. 39, line 17 to p. 43, line 3.

Dr. Prien testified that professional research exists which demonstrates that time spent performing a job task is not necessarily the best indicator of the relative importance of tasks and elements.

The items on the series of examinations used to select sergeants, like most of the items on the other examinations challenged by the Government, were derived from textbooks. Both Dr. Menne and Dr. Prien testified that it is poor practice to derive items from textbooks for exams developed by a content strategy. The danger is that the items would reflect the content

of the textbook more than they reflect the content of the job. Dr. Prien noted the potential for constructing tests to fit chapters in textbooks, rather than the identified job elements. Dr. Menne noted that the practice of supplying reading lists to applicants and then developing exams based on the reading lists may lead to test results that do not provide data on which applicants possess more knowledge of the information needed to perform the job. Such a test, he testified, may actually measure which applicants actually studied the textbooks— and the textbooks may or may not relate to the job.

The reading list for the sergeant examinations were rather lengthy. For example, the 1974 list contained 21 textbooks, as well as Titles 14 and 15 of the Code of Alabama. *Id.*, Deposition Exhibit No. 1. (See D-X-385, Attachment No. 2 for the 1977 reading list which contains the same number of books.) Corwin testified that all the test items were derived from the books on the reading list and that there were items for each book on the list. *Id.*, p. 44, line 2 to p. 46 line 6. See P-X-123, pp. 9-11.

Dr. Prien testified that he reviewed the sergeant examinations and found that a substantial number of multiple choice items on the test had a convoluted and overly complex style. Items of that style assess an individual's test-taking ability to a greater extent than they assess an individual's knowledge.

The Content Validity Verification Report, D-X-404, identifies 20 domain statements, 27 knowledge statements, 11 ability statements and 3 skill statements. D-X-404, Exhibits 4 and 5. A total of 28 incumbents and supervisors participated in the study.

(In 1977, the SMEs rated and ranked the domains and the KASPCs, identified linkages between KASPCs and domains, and reviewed 450 items selected from the item bank. The data compiled on these 450 items is not contained in the Validity Study. In 1978, the SMEs reviewed the five tests used by the Personnel Board between 1972 and 1976.)

Of the 20 domain statements, only 9 received median ratings of 3.0 or higher on factor D, Extent Necessary At Entry (D-1, D-3, D-4, D-6, D-7, D-8, D-13, D-14, D-20). P-X-178. Only 5 domain statements received mean ratings of 3.0 or higher on factor D (D-1, D-4, D-7, D-8, D-13) D-X-404, Exhibit 1-Domain Ratings.

Of the 41 knowledge, ability and skill statements, 13 received mean ratings below 3.0 (K-9, K-10, K-11, K-13, K-15, K-16, K-22, K-23, K-24, A-5, A-7, A-8, S-3), D-X-404, Exhibit 1-KASPC Ratings; five statements received median ratings below 3.0 (K-11, K-15, K-16, K-24, S-3). P-X-178.

The highest ranking KASPC statement was A-1, ability to communicate orally. D-X-404, Exhibit 1-KASPC Rankings.

The SMEs were grouped in subpanels of 5 or 6 persons to assess the five tests used between 1972 and 1976, even though there were at least 28 SMEs available to review the tests.

Dr. Prien's summary exhibit, P-X-131, shows that four of six SMEs were able to agree on item to KASPC linkage for 154 of 260 items (59.2%) on test No. 1, 131 of 260 items (50.4%) on test No. 3, and 126 of 250 items (50.4%) on test No. 4. Four of five SMEs were able to agree on item to KASPC linkage for 108 of 250 items (43.2%) on test No. 2 and 80 of 250 items (32%) on test No. 5.

When a standard that requires a simple majority of SMEs (four out of six or three out of five) to agree on linkage of items to KASPCs with a 3.0 or higher median rating which are, in turn, linked by a simple majority of SMEs to the class of domains with a 3.0 or higher median rating on factor D is applied to the data generated by the SMEs the following linkages result: *

Test No.	No. of Items	No. of Items Linked
1	260	127 (48.8%)
2	250	153 (61.2%)
3	260	131 (50.4%)
4	250	111 (44.4%)
5	250	135 (54%)

* Based upon P-X-178, Column 2B (Lax).

Dr. Menne's notes, P-X-124, show that he reviewed two versions of the sergeant examinations, a 260 item test and a 250 item test adminstered on November 8, 1978. The following chart shows the number of items he was able to link to KASPCs in what he determined to be the "certification domain":

	260-item test	Nov. 8, 1978 Test Items 1-129	Items 130-150	Total
K-1	25	37	1	38
K-5	9	2	1	3
K-12	0	0	0	0
K-3	0	0	0	0
K-4	0	2	2	4
K-7	7	21	2	23
K-6	50	11	3	14
K-26	12	5	3	8
A-3	0	0	0	0
K-8	5	4	4	8
K-21	51	0	40	40
K-27	18	1	2	3
K-19	1	9	0	9
K-25	1	1	0	1
K-14	0	0	13	13
K-18	4	1	1	2
K-2	0	5	0	5
K-17	1	0	1	1
K-23	3	0	4	4
K-20	0	0	3	3
K-11	10	0	9	9
K-10	0	0	0	0
K-9	0	1	0	1
K-24	1	1	0	1
K-22	11	1	3	4
K-16	0	0	0	0
K-13	0	4	11	15
K-15	2	0	0	0
A-7	5	0	0	0
No Linkage	44 (16.9%)	20	15	35 (14%)
D-20	0	2	0	2
D-7	0	1	0	1
D-2	0	0	2	2

The chart shows that many of the highly-ranked job elements were not tapped at all or only tapped by a few items. Moreover, on the 260-item test he was unable to link 44 items (16.9%) and on the 250-item he was unable to link 35 items (14%). Nevertheless, Dr. Menne gave the evidence of the validity of the examinations a grade of B-, with the 1978 examination receiving a grade of B/B+. P-X-122.

Dr. Prien testified that it is inappropriate to eliminate from formal assessment important job elements in a selection procedure supported by evidence of content validity. In particular, he noted that A-1, ability to communicate orally, could have been assessed using either a structured oral interview or an assessment center approach. He further testified that the adverse impact a paper-and-pencil test has on blacks can be reduced by using such selection procedures and by reducing the weight in the total selection process that the written test is accorded.

Miriam Hall testified that the rank order eligibility list is based solely upon scores on the written test and points awarded for years of classified service. Hall further testified that the Personnel Board provides no means by which the KASPCs that were not assessed by the written test can be formally assessed during the probationary period. As a result, important job elements, such as oral communications skills, are never formally assessed.

Dr. Prien noted that supervision and leadership are an important part of a sergeant's job. He testified that a paper-and-pencil test of supervision and leadership cannot be supported by evidence of content validity because leadership is a construct. In addition, he noted that a paper-and-pencil test of supervision and leadership does not closely resemble the work setting in which these worker characteristics are exhibited.

Dr. Prien testified that the evidence presented does not support a finding that the examinations were content valid in light of professional standards and federal guidelines.

9. Secretary

The Content Validity Verification Report, D-X-406, identifies four versions of a 160-item paper-and-pencil test used to select secretaries between 1972 and 1976. A fifth version of the test was constructed in 1977 and used on two occasions. D-X-393, Tab 13.

The Examiner's Manual, D-X-387, contains a preconstruction analysis completed by personnel officer Marilyn Landers in December 1974. In addition, a "rationale" and part of a preconstruction analysis dated June 17, 1977, appear in P-X-123, pp. 13 and 15. These documents are the only evidence that purport to document how any of the examinations at issue were constructed.

Miriam Hall, the Chief Examiner of the Personnel Board, testified that the personnel analysts relied upon Position Classification Questionnaires (PCQs) completed as part of the five year Classification and Pay Study, the Job Specification, a synopsis of the PCQs which appears in the Board's Classification and Pay Manual, and the Dictionary of Occupational Titles in constructing examinations. These documents do not provide information about whether an individual needs to be able to perform job tasks at entry into the position or whether the individual is trained on the job. Nor is such information provided concerning the knowledges, skills and abilities needed to perform the job tasks. Further, the documents provide little data on the relative importance of the job tasks other than an employee's indication of the amount of time he or she spends performing a task. No information is provided about the criticality of a task nor about whether how an individual performs a task differentiates between the quality of individual workers. As a general rule, Personnel Board technicians did not meet with job incumbents or systematically observe their work as part of the test construction process. An unstructured meeting with department heads or supervisors served, as a general matter, as the only supplementation of the Classification and Pay data.

Form I of the 1974 preconstruction analysis indicates that a secretary "composes and types letter [sic] and reports." D-X-387. The Job Specification, which has been identified as a document underlying the preconstruction analysis, indicates that a secretary "composes and types *routine* letters, notices and other material" (emphasis added). Neither document provides greater specificity about how often secretaries are called upon to compose something and what it is they may be called upon to compose. For example, the documents do not provide information about whether secretaries who compose routine letters base their letters on forms.

The weighting of the exam prepared by Landers in 1974 is: 30% on business English, 35% on principles of leadership and supervision, methods of discipline, organization and policy, training and motivation and effective employee relations, 25% on general secretarial procedures, 5% on business arithmetics and 5% on filing. D-X-387. The weighting of the exam prepared in 1977 is basically the same. See P-X-123, p. 15.

The Content Validity Verification Report, D-X-406, Exhibit 4, identifies ten domain statements. Of the 8 SMEs, four indicated that D-3, D-7, and D-9 were not performed by secretaries. Notably, D-7 is the only domain concerning super-

vision. D-X-406, Exhibit 1-Domain Ratings. Of the four SMEs who indicated that supervision was not part of a secretary's job, one (SME No. 6) worked for Birmingham, one (SME No. 1) worked for the Health Department, and two (SMEs No. 6 and No. 5) worked for Jefferson County.

The Personnel Board presented no evidence of a systematic effort to review the degree of specialization by secretaries or the degree to which a classification problem might exist. Dr Prien testified that in case of a heterogeneous job class, the same exam given to all applicants cannot be justified by evidence of content validity unless: (1) successful applicants were subject to placement in any of the specialized or idiosyncratic positions within the job class, or (2) the job changed over time (e.g. seasonally) so that over a period of time all of the job duties tapped by the test would be performed by the individual, or (3) incumbents were routinely transferred from a position with one set of duties to a position with another set of duties. The Personnel Board did not present evidence that any of these factors exist in the secretary classification.

Of the ten domain statements only D-1 and D-2 received mean ratings of 3.0 or higher or factor D, Extent Necessary At Entry, D-X-404, Exhibit 1-Domain Ratings and only D-1, D-2 and D-4 received median ratings of 3.0 or higher on factor D. P-X-180.

The Validity Study combines the separate tasks of composing, typing and distributing "a wide variety of material" together into a single domain statement, D-1. This statement is the only statement that deals with what, if anything, secretaries are called upon to compose. The SMEs, therefore, did not have an opportunity to address separately the issue of whether secretaries compose anything.

Of the 27 knowledge, skill and ability statements, six received mean ratings below 3.0 (K-6, K-9, K-10, K-13, K-14, A-4). D-X-404, Exhibit 1-KASPC Ratings. All KASPCs received median ratings of 3.0 or higher. P-X-180.

Although there were 50 secretaries at the time the validity study was conducted, D-X-387, p. 8, only 5 SMEs reviewed tests 1 and 2 and only 3 SMEs reviewed tests 3 and 4. Dr. Prien testified that the three person subpanel was unacceptable in light of the number of incumbents in the classification. In addition, he testified that the ratings of the three person panel would not produce meaningful results from a statistical standpoint.

Dr. Prien identified two reasons why the supervision segment was professionally suspect. First, what is identified in the preconstruction analyses as a "leadership and supervision" segment of the tests really seeks to test a construct — leadership. As such, a test tapping leadership ability cannot be justified based on evidence of content validity; rather, empirical evidence is required. Second, Dr. Prien's professional opinion is that ability to supervise cannot be assessed by a paper-and-pencil test, in part, because a paper-and-pencil test does not closely resemble the setting in which supervisory functions are performed.

Dr. Prien's summary exhibit, P-X-131, shows that the five SMEs who reviewed tests 1 and 2 agreed on item to KASPC linkage for 16 out of 160 items in test No. 1 and 26 out of 160 items in test No. 2. When the consensus standard is reduced to require agreement between three of the five SMEs to a particular KASPC, then 112 items (70%) survive on test No. 1 and 109 items (68.1%) survive on test No. 2. P-X-180, Column 1 (Lax).

Dr. Menne identified KASPCs that belonged in what he called the "certification domain". P-X-124. The KASPCs in the "certification domain" that are linked by at least five of the eight SMEs to the three domain statements that received median ratings of 3.0 or higher on factor D are as follows:[14]

D-1: K-1, K-3, K-4, K-5, S-3

D-2: K-1, K-2, K-4, K-5, S-3

D-4: K-8, K-10, S-5

Dr. Menne reviewed four tests and attempted to link items to KASPCs in the "certification domain". Column one of the following chart displays the number of items he was able to link to KASPCs in the "certification domain" for each test. Column two displays the number of items he was able to link to KASPCs in the "certification domain" which were in turn linked by a majority of the SMEs to D-1, D-2, D-4, i.e., K-1, K-2, K-3, K-4, K-5, K-8, K-10, S-3, S-5.

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14 Based upon Exhibit 1, KASPC-Task Tie-In Occurrence Table, D-X-406.

Exam Date(s)	No. of Items	Column 1	Column 2
7/21/72; 10/11/73[15]	110	103(93.6%)	85(77.3%)
1/15/75	160	145(90.6%)	81(50.6%)
4/30/76	160	142(88.8%)	83(51.9%)
7/11/77	160	155(96.9%)	89(55.6%)

Dr. Menne gave the evidence of the validity of these examinations a grade of B-/C+. P-X-122.

Dr. Prien testified that the evidence presented does not support a conclusion that any of the tests used between 1972 and 1978 were content valid in light of professional standards and federal guidelines.

10. Senior Clerk

Defendants' Content Validity Verification Report, D-X-407, identifies six versions of a 150-item paper-and-pencil test, used to select senior clerks. Six administrations occurred between 1972 and 1976; a subsequent revision was administered in January 1977. In June 1978, after the results of the validation study were known, the test was administered in a reduced and modified version containing 140 items. D-X-393, Tab 14.

The Examiner's Manual, D-X-388, contains a preconstruction analysis done by personnel officer Ruth Corwin in September 1975 for the sixth test administered during the period 1972 and 1976. In addition, certain material relating to an item analysis done in December 1976 appears in P-X-123, p. 20. The above-mentioned are the only pieces of evidence purporting to document how any of the examinations for senior clerk were constructed.

Miriam Hall, the Chief Examiner of the Personnel Board, testified that the personnel analysts relied upon Position Classification Questionnaires (PCQs) completed as part of the five-year Classification and Pay Study, the Job Specification, a synopsis of the PCQs which appears in the Board's Classification and Pay Manual, and the Dictionary of Occupational Titles,

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15 It is not clear whether this examination was, in fact, used to select secretaries. Neither the Examination Chronologies, D-X-393, Tab 13, nor the Government's Exhibit on the Pass Rates of Whites and Blacks on Challenged Examinations, P-X-59, indicate that an examination for secretaries was administered on either of these dates. In addition, each of the four exams identified in the Validity Study, D-X-406, contained 160 items.

in constructing examinations. These documents do not provide information about whether an individual needs to be able to perform job tasks at entry into the position or whether the individual is trained on the job. Nor is such information provided concerning the knowledges, skills and abilities needed to perform the job tasks. Further, the documents provide little data on the relative importance of the job tasks other than an employee's indication of the amount of time he or she spends performing a task. No information is provided about the criticality of a task or about whether performance of the task differentiates between high and low quality workers on the job as a whole. As a general rule, Personnel Board technicians did not meet with job incumbents or systematically observe their work as part of the test construction process. An unstructured meeting with department heads or supervisors served, as a general matter, as the only supplementation of the classification and pay data.

A review of Form I of the September 1975 preconstruction analysis contained in D-X-388 reveals that many of the statements of job tasks and of knowledges, skills and abilities thought to be related to the jobs were copied verbatim from the job specification contained in the Classification and Pay Manual. See D-X-407, Exhibit 2. Deviations from the manual include the addition of such "personal characteristics" as "dependable," "self-confident," "intelligent" and "diplomatic." Form II, the weighting form, contains no explanation or justification for either the categories to be measured by the test or the relative weights assigned to them by the technician, save the phrase, "review of job spec." Supervision received a weight of 20% on the weighting form, and accordingly Form III shows 31 questions, worth 29 out of a total of 150 points, designed to measure supervision.

Dr. Prien's professional opinion is that ability to supervise cannot be assessed by a paper-and-pencil test. This is in part because such a test does not closely resemble the performance of supervisory functions in an actual work setting. That testimony condemns the 20% of the test on supervision, which purports to measure the "ability to lead or supervise subordinate level personnel" (D-X-388, Form I).

Of the domain statements used in the Content Validity Verification Report, D-X-407, only D-12 involved supervision. The SMEs gave that domain a median rating of only 2.0 on Factor D, Extent Necessary at Entry. P-X-181. There is an addi-

tional problem with the supervision domain, D-12: four of the 17 SMEs indicated that the job did not include performance of it. D-X-407, Exhibit 1-Domain Ratings. The four were not concentrated in any particular jurisdiction: No. 1 listed Fultondale as her employer, No. 3 listed Mountain Brook, No. 4 listed Jefferson County, and No. 13 listed "Inspection Services" without indicating the jurisdiction.

The Rationale which appears in the Examination Chronology, D-X-393, Tab 14, notes that the SMEs eliminated 23 of the 35 items on the 1977 test which concerned supervision. The Rationale concludes that the validation study data reflect either a classification problem or "a lack of recognition by some Senior Clerks that some of the duties performed (by them) are supervisory in nature." D-X-393, Tab 14, Rationale. Despite the evidence that supervision was not uniformly a part of the job and was in any event not rated as an important part of the job, the supervision segment of the examination was retained in the 1978 exam. *Id.*

Ratings of domains other than supervision (D-12) confirm that there was a problem of "diversity," as stated by Personnel Board Analyst Jerry Burchfield in his Report of Findings. Domains D-9, D-10, D-11 and D-14 were identified as not performed by 10 or more raters, while D-4, D-5, D-6 and D-12 (the last having been mentioned above) were so identified by four or five raters. D-X-407, Exhibit 1-Domain Ratings.

The Personnel Board presented no evidence of a systematic effort to review the degree of specialization by senior clerks or the degree to which a classification problem might exist. Dr. Prien testified that in the event a job class is heterogeneous, the same examination given to all applicants cannot be justified by evidence of content validity unless: (1) successful applicants are subject to placement in any of the specialized or idiosyncratic positions within the job class, or (2) the job changes over time (e.g., seasonally) so that over a period of time all of the job duties tapped by the test are performed by the individual, or (3) incumbents are routinely transferred from a position with one set of duties to a position with another set of duties. The Personnel Board did not present evidence that any of these factors existed in the senior clerk classification.

Of the 14 domain statements, only D-6, D-9 and D-11 received mean ratings of 3.0 or higher on factor D, Extent Necessary at Entry, and then only when the calculation was

restricted to the raters indicating the domain was performed (12, 7 and 1 raters, respectively). D-X-407, Exhibit 1-Domain Ratings.[16] Only D-1, D-2 and D-8 received median ratings of 3 or higher on that factor.

Of the 45 KASPCs, there were 27 which a majority of the 17 SMEs linked to any of the three domains having a median rating of 3.0 on Factor D: K-1, K-2, K-3, K-4, K-5, K-6, K-7, K-8, K-14, K-17, A-1, A-2, A-3, A-4, A-5, A-6, A-9, A-10, A-11, S-1, S-2, S-3, S-4, P-1, P-2, P-3, P-4. P-X-181. Of these, 24 KASPCs received median ratings of 3.0 or above: K-1, K-2, K-4, K-5, K-6, K-7, K-8, K-17, A-1, A-2, A-3, A-4, A-5, A-6, A-9, A-11, S-1, S-2, S-3, S-4, P-1, P-2, P-3, P-4. *Id.* Of these, seven KASPCs (K-2, K-4, K-5, K-17, A-1, S-2) were measured by items according to the linkage operation described in Dr. Menne's notes, P-X-124. Those KASPCs are shown below with their importance ranks as computed by defendants, along with the numbers of items linked to each KASPC for the tests analyzed by Dr. Menne in P-X-124:

KASPC	Rank	Test 1	Test 2
K-5	1	12	22
K-2	2	27	29
K-6	3	10	9
K-4	5	20	20
A-1	10	1	0
K-17	11	0	3
S-2	12	12	7
Total		82	98

Thus, Dr. Menne was unable to link at least one-third of the 150 items on these tests to KASPCs having at least a 3.0 median rating and linked by a majority of the SMEs to any of the three domains which received a median rating of 3.0 on factor D.

Dr. Menne did link a number of items to certain KASPCs not meeting the above standards. These KASPCs were K-21, with 26 items in Test 1 and 31 items in Test 2; K-10, with 17 items in Test 1 and 17 items in Test 2; and K-12, with eight items in Test 1 and five in Test 2. K-21, "knowledge of basic supervision techniques," suffers from the earlier-described infirmities

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16 A defendants' exhibit gives some mean values on two factors. D-X-413, fourth page. Those seem to be mean ratings on factors D and E, not C and D as labeled.

in the testing of ability to supervise. In addition, K-21 received a mean rating of only 2.8 from the SMEs who rated it. D-X-407, Exhibit-1, KASPC Ratings. Fourteen out of 17 SMEs linked that KASPC to D-12, the supervision domain, which received a median rating of only 2.0, P-X-181, and a mean rating of 1.9 (2.5 if the calculation is done only on those saying the task was performed) on factor D. D-X-407, Exhibit 1-Domain Ratings. As noted earlier, the 1978 Rationale stated that 23 of the 35 supervision items on the 1977 test were found non-job-related by the SMEs. D-X-393, Tab 14, Rationale.

A second KASPC to which Dr. Menne linked a number of items but which did not meet the above standards, was K-10, "knowledge of basic math as it pertains to addition, subtraction, multipulication [sic] and division of whole numbers, mixed numbers, fractions and decimals." That KASPC was linked by 13 out of 17 raters to D-4, relating to computing, collecting and posting fines and fees, and making bank deposits. D-X-407, Exhibit 1-KASPC-Task Tie-In Occurrence Table. That domain received a median rating of 2.0, P-X-181, and a mean rating of 1.8 (2.6 counting only the twelve out of 17 raters who said the domain was performed) on factor D. D-X-407, Exhibit 1-Domain Ratings. That KASPC measured an unimportant domain. The third KASPC in the group, K-12, "knowledge of banking such as preparing or making bank deposits," could be linked only to the same weak domain, D-4, because D-4 is the only domain which mentions banking. Only seven of the SMEs linked K-12 to D-4. D-X-407, Exhibit 1-KASPC-Task Tie-In Occurrence Table.

Retranslation to KASPCs with 3.0 median ratings and domains with 3.0 medians on factor D results in the following numbers of items surviving out of 150 items total: Test 1, 56 items; Test 2, 52 items; Test 3, 46 items; Test 4, 57 items; Test 5, 55 items; Test 6, 38 items. P-X-181, column 2B, pp. 14-9, 14-18, 14-27, 14-36, 14-45, 14-54.

After the first segment of this trial, defendants undertook an exercise in test rescoring by which they attempted to show that the dropping of non-job-related items from the senior clerk examination has little effect upon the results of the examination. See D-X-413, fourth through sixth pages. That attempt is flawed in several ways:

(1) The Personnel Board ignored its own evidence on the number of inappropriate items. The October 1975 version of

the test (Test 2) was assumed for purposes of the rescoring exercise to have only 26 non-job-related items, whereas the defendants validity study concluded that 39 items were found not to be job-related by the SMEs rating the exam.

(2) Only the tests of those who passed were rescored and re-ranked. Thus, there was no attempt to assess the impact of rescoring upon the pass/fail determinations made as a result of using the test.

(3) Even with the artificial limitations placed upon the rescoring by defendants, as set forth in (1) and (2) above, the rescoring resulted in dramatic reordering of the 22 applicants on the eligibility list. For example, the applicant ranked fourth on the original list was 14th on the recompleted list.

Dr. Menne gave the evidence of validity of the senior clerk examination a grade of B/C+. P-X-122.

Dr. Prien testified that the evidence of validity does not support a conclusion that the examinations are content valid in light of professional standards and federal guidelines.

11. Senior Recreation Leader

The Personnel Board has used a paper-and-pencil examination developed by the Public Personnel Association (PPA) in the 1960s to select senior recreation leaders. D-X-393, Tab 15. There is no evidence that PPA reviewed or analyzed the position of senior recreation leader as it existed in the jurisdictions served by the Personnel Board during the test construction process. Nor is there any evidence that, prior to the content validity verification session in March 1978, the Personnel Board conducted a job analysis of the senior recreation leader classification to determine whether the content of the job comported with the content of the PPA examination.

The Examination Chronology for senior recreation leader, D-X-393, Tab 15, identifies the following content areas of the PPA examination: "*reading comprehension*, recreation principles, sports, recreation activities, *leadership*, first aid, records and reports, community relations, and arts and crafts" (emphasis added).

Both Dr. Prien and Dr. Menne expressed reservations about the use of a reading comprehension segment on a test supported by evidence of content validity. Their concern was whether a general assessment of reading comprehension was related to the content of the job. Dr. Prien testified that a reading

comprehension segment of a test could be supported by evidence of content validity only if the reading material on the test was similar or identical to reading material that an incumbent would have to work with on the job. There was no such showing in regard to the senior recreation leader examination.

"Leadership" has been recognized by the professional standards and federal guidelines as a construct. For that reason, Dr. Prien testified that an assessment of leadership cannot be supported by evidence of content validity. In addition, Dr. Prien testified that "leadership" or "supervision" cannot adequately be assessed by a paper-and-pencil test because such a test does not closely resemble the setting in which supervisory or leadership functions are performed.

The Content Validity Verification Report, D-X-408, Exhibits 4 and 5, identifies five domain statements, knowledge statements and seven ability statements. A comparison of the knowledge and ability statements with those contained in the Job Specification, D-X-408, Exhibit 2, shows that many of the statements in the Validity Study are taken directly from the specification (See K-1, K-2, K-3, K-4, A-1, A-2, A-3 and K-8).

The Validity Study used only three incumbents and two supervisors as SMEs. The study indicates that there were 10 incumbents in the position at the time the study was conducted. D-X-408, p. 8.

All four domain statements received mean ratings below 3.0 on Factor D, Extent Necessary at Entry, D-X-408, Exhibit 1-Domain Ratings. All received 3.0 median ratings on that factor. P-X-182. Of the knowledge and ability statements K-8 and K-10 received mean ratings below 3.0. D-X-408, Exhibit 1-KASPC Ratings. All KASPCs received median ratings of 3.0 or higher. P-X-182.

Of the 125 items on the exam, 70 items (56%) received mean item ratings of 2.4 or below. D-X-408, Exhibit 1-Items-Distribution of Ratings. Six items were rejected by three or more SMEs as being unrelated to the job. D-X-408, Exhibit 1-Items-Ratings.

The SMEs were asked to assess the difficulty of the examination in relation to the difficulty of the job. Job Analysis Questionnaire (JAQ) Booklet, p. 46, question 3. Four of the five SMEs rated the exam to some extent harder than the job.

Dr. Prien's summary exhibit shows that four of the five SMEs were able to agree on item to element linkage for 34 of the 125 items (27.2%) on the exam. P-X-131. If the consensus standard is lowered to agreement between three of the five SMEs, then 69 items (55.2%) would meet the standard. P-X-182, Column 1 (Lax).

Dr. Menne's initial analysis of the evidence of validity led him to give the evidence a grade of B/B-, P-X-122; however, at trial he testified that the appropriate grade would be in the C range.

Dr. Menne's notes indicate that he was unable to link 22 of the 125 items (17.6%) to any KASPC. P-X-124. An additional 20 items were identified as "marginally related to the job." A total of 42 items, one-third of the test, either were not linked to any KASPC or were only marginally related to the job.

In 1978, Miriam Hall reviewed the validity study and decided to add 26 items dealing with supervision. D-X-393, Tab 15. Four items from the basic test were deleted. Two items (37 and 53) which the Validity Study recommended should be deleted, D-X-408, p. 1[illegible], were left in the test and another three items (51, 60, and 120) which received mean ratings below 2.0 were left in the test. D-X-393, Tab 15, p. 3. In addition, the reading comprehension segment remained in the examination.

Dr. Prien testified that the evidence presented does not support a finding that the examinations are content valid in light of professional standards and federal guidelines.

12. Stenographer/Intermediate Stenographer

The Personnel Board has used three similar paper-and-pencil tests in the classifications of stenographer and intermediate stenographer. Prior to August 1974, stenographer and intermediate stenographer were separate classifications. A 55-item test was used for stenographers and a 70-item test was used for intermediate stenographers. In August, 1974, the two classes were merged. The 70-item test was used until it was replaced in March 1977 by a 96-item test. All three forms of the written test were used in conjunction with a 150 item dictation test. Applicants were ranked based on their combined scores on the written and dictation tests. Passing points were determined based upon the combined scores. D-X-393, Tab 17; D-X-410; P-X-139.

The Examiner's Manual, D-X-391, does not contain a preconstruction analysis or any other documentation of how the tests were constructed. Nor does the Examination Chronology, D-X-393, Tab 17, contain a complete description of how the tests were constructed.

Jerry Burchfield, the personnel analyst who prepared the Content Validity Verification Report, D-X-410, testified that the stenographer classification is a heterogeneous one. He testified that:

> In some departments, they [stenographers] will spend most of their time taking dictation and shorthand from maybe three or four people. Maybe in a smaller jurisdiction, they answer the telephone, they serve as, you know, a receptionist, they type, they file, fill in for the city clerk, may run a gamut of I don't know what all.

Trial Transcript, pp. 1079, line 21 to p. 1080, line 2.

At the time the validity study was conducted, there were 98 stenographers, 56 of whom (57.1%) worked for various departments within the City of Birmingham. Of the nine incumbents and supervisors involved in the study only two (22.2%) worked for Birmingham. Both of the SMEs who worked for Birmingham (SME #4 and SME #55) worked in the Police Department's detective division, which employed only six stenographers as of 1976. P-X-1, pp. 110, 112. As a result, the possible range of job duties within the stenographer classification in Birmingham was not assessed completely.

The Personnel Board presented no evidence of a systematic effort to review the degree of specialization by stenographers, even through Mr. Burchfield testified that he recognized the class was a heterogeneous one. Dr. Prien testified that when a job class is heterogeneous, evidence of content validity cannot justify the use of the same examination to assess all applicants unless: (1) successful applicants could be placed in any of the specialized or idiosyncratic positions, or (2) the job changed over time (e.g., seasonally) so that over a period of time all of the job duties tapped by the test would be performed by the individual; or (3) incumbents were routinely transferred from a position with one set of duties to a position with another set of duties. The Personnel Board did not present evidence that any of these factors existed in the stenographer classification.

The validity study identifies six domain statements. D-X-410, Exhibit 4. The two highest-ranking domains concerned taking dictation (D-1) and typing (D-2). Surprisingly, two of the SMEs (SME No. 3 and SME No. 53) indicated that stenographers at Cooper Green Hospital were rarely, if even, called upon to take dictation. D-X-410, Exhibit 1-Domain Ratings, Task 1, Factor A. Six of the nine SMEs indicated that D-5, which concerned "mathematical and fiscal computations," was rarely, if ever, performed by stenographers. D-X-410, Exhibit 1-Domain Ratings, Task 5, Factor A.

Four of the six domain statements received mean ratings lower than 3.0 on Factor D, Extent Necessary At Entry (D-1, D-3, D-5, D-6). D-X-410, Exhibit 1-Domain Ratings. All six domain statements received 3.0 median ratings on Factor D. P-X-184, face sheet.

Of the 40 knowledge, skill and ability statements, 17 received mean ratings below 3.0 (K-3, K-6, K-7, K-9, K-10, K-12, K13 [sic], K-14, K-15, K-16, K-17, K-18, A-7, A-10, A-12, S-7, S-8). D-X-410, Exhibit 1-KASPC Ratings. Seven of the statements received median ratings below 3.0 (K-9, K10 [sic], K-12, K-14, K-16, A-10, S-7). P-X-184.

Of the three written tests, only the 55 item test and the 70 item test were reviewed by the SMEs and by Dr. Menne. Dr Prien's summary exhibit shows that five of the nine SMEs were able to agree on item to KASPC linkages for 38 items on the 55 item test (69.1%) and 41 items on the 70 item test (58.6%). P-X-131.

Dr. Menne's notes show that on the 70 item test, he linked 17 items (24.3%) to K-8, knowledge of the principles and practices of modern office procedure. P-X-124. K-8 was ranked 30th of the 45 KASPCs by the SMEs. D-X-410, Exhibit 1-KASPC Rankings. In addition, K-8 was linked to D-6 by all of the raters and was not linked to any other domain by a majority of raters. D-X-410; Exhibit 1-KASPC-Task Tie-In Occurrence Table. D-6 received a 2.7 mean rating on Factor D, D-X-410, Exhibit 1-Domain Ratings, and was ranked fifth of the six domains by the SMEs. D-X-410, Exhibit 1-Domain Ratings.

According to Dr. Menne, both exams contained items which were linked to K-13 and which concerned basic math (5 items on the 55 item test, 6 items on the 70 item test). P-X-124. K-13 was ranked 35th of the 45 KASPCs by the SMEs. D-X-410, Exhibit 1-KASPC Rankings. In addition, K-13 was linked

to D-5 by all of the raters and was not linked to any other domain by a majority of raters. Exhibit 1-KASPC-Task Tie-In Occurrence Table. As noted earlier, six of the nine SMEs indicated that D-5 was rarely, if ever, performed by stenographers.

Dr. Menne gave the evidence of the validity of the exams a grade of B. P-X-122.

Dr. Prien testified that the evidence of validity does not support a conclusion of content validity in light of professional standards and federal guidelines.

13. Utility Meter Reader

The Personnel Board used a 77-item paper-and-pencil test to select utility meter readers between 1972 and 1976. The test consisted of 50 short-answer questions and 27 questions concerning reading dials on drawings of meters. In 1978, the Board dropped the 50 short-answer questions from the exam.

The Examiner's Manual, D-X-392, does not contain a preconstruction analysis or any other documentation of how the test was constructed.

The Content Validity Verification Report, D-X-411, Exhibit 4, identifies four domain statements. D-1, which concerned reading meters, is the only domain that received a mean or median rating of 3.0 or higher. D-X-411, Exhibit 1-Domain Ratings; P-X-185. D-4, which concerned maintenance tasks, was considered not to be part of the job by four of the seven subject matter experts.

Of the 16 knowledge, skill and ability statements identified in Exhibit 5 of the validity study, only four received mean ratings of 3.0 or higher (K-2, A-1, A-3, S-1). D-X-411, Exhibit 1-KASPC Ratings. Only seven received median ratings of 3.0 or higher (K-1, K-2, K-3, A-1, A-2, A-3, S-1). P-X-185.

A majority (four or more out of seven) of the SMEs rejected 16 of the 77 items (20.8%) as being unrelated to the job. D-X-411, Exhibit 1-Items-Ratings. Eighteen items (23.4%) received mean item ratings below 2.0; 38 items (49.4%) received mean item ratings below 2.5 D-X-411, Exhibit 1-Items-Distribution of Item Ratings.

Dr. Prien's summary exhibit shows that five or more of the SMEs agreed on an item to element linkage for only 11 items. P-X-131. Even if K-2 and S-1, both of which concern math, are

considered identical, only 42 of the 77 items (54.5%) meet this retranslation standard.

Dr. Menne gave the evidence of validity a grade of C. Dr. Menne's notes, P-X-124, show that he found 19 items not relevant, 12 items barely or marginally relevant, and 5 items poor; a total of 36 out of 77 items (46.8%) fit into these categories.

Dr. Prien concluded that the evidence does not support a conclusion that the examination was content valid in light of professional standards and federal guidelines.

II. PROMOTIONAL POTENTIAL RATINGS

A. Review of Evidence

All employees in the classified service receive promotional potential ratings (Form 28B, Pl. Ex. 23) from their supervisors every six months. The only purpose and effect of this evaluative rating is to determine whether an individual employee is eligible to promote to a higher level job (Tr. 640, Testimony of Joseph Kerr). An employee receiving below an 85 rating is barred from applying for a promotion and/or competing on a promotional examination for six months from the effective date of the rating (Tr. 640, Testimony of Joseph Kerr).

The Government has offered evidence which demonstrates that the use of the promotional potential rating form as a screening instrument for promotional opportunities has had an adverse impact upon blacks in the classified service. This evidence was in the form of statistical charts and the expert testimony of a statistician which analyzed the ratings given to blacks and whites from August, 1977 to January, 1978, the first six-month period (Cycle I) in which all non-probational classified employees received ratings on a system-wide basis (Tr. 55-59, Testimony of Lorna Grenadier; Tr. 580-1, Testimony of Joseph Kerr). The base data for the Government's statistical charts were computer printouts supplied by the Personnel Board.[17]

Since the same Form 28B is used throughout the classified service to evaluate employee promotional potential, the Government presented evidence of the overall adverse impact of the

17 In their brief, for the first time, defendants question the source and accuracy of the data reflected in Plaintiff's Exhibits 70 and 71 (Brief of Def., p. 30). This belated objection is hard to understand, since the departmental totals of blacks and whites passing and failing which appear in

rating system on blacks in the classified service (Pl. Ex. 71). The Government also presented evidence analyzing the passing rates for blacks and whites by department (Pl. Exs. 70, 72), since departmental supervisors administer the ratings and employees promote ordinarily within the same department and jurisdiction. Lastly, in response to a rebuttal exhibit submitted by the Personnel Board, the Government offered evidence of adverse impact upon blacks, looking only at those employees in promotional pools for which particular examination announcements were made during the effective life of their Cycle I ratings (Pl. Ex. 144).

Plaintiff Exhibit 71 reflects that for Cycle I the passing rate for blacks as compared to whites system-wide was 53.62%.[18] The computed chi-square value and summed chi-squares of departments demonstrate that te level of statistical significance between the disparities in black and white pass rates is far in excess of the .001 level. In this regard Dr. Ireland, a statistical expert, testified with respect to Pl. Ex. 71 that the large value of chi-square indicated that the differences in the expected pass rates for blacks and whites from the observed rates were statistically significant (Tr. 109-110, Testimony of Clifford T. Ireland). Dr. Ireland also testified as to the appropriateness and theoreticl basis for using the sum of chi-squares to take into account the possibility that there were different expected pass rates in each department. (Tr. 111-113, Testimony of Clifford T. Ireland).

Plaintiff Exhibit 70 presents the statistical data on a departmental basis in order to focus more specifically where the

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Pl. Ex. 71 and from which jurisduction totals in Pl. Ex. 70 were derived, were those supplied by the Personnel Board in response to a Request for Admission. Moreover, these exhibits were received into evidence without objection as to the accuracy of the data itself (Tr. 57, 59). Defendants' own witness, Mr. Kerr, testified that he had no reason to doubt that the ratings had the impact suggested by the Government. (Tr. 582, Testimony of Joseph Kerr).

18 Although Cycle I reflects the first six-month period in which all classified employees received promotional potential ratings, evidence and testimony presented by the Personnel Board established that after five of the next six months of Cycle II (February 1978-June, 1978), the identical pass/fail rate continued. (Def. Ex. 359; Tr. 639, Testimony of Joseph Kerr). This evidence strongly suggests (and there was nothing offered to the contrary) that the disparate racial pattern of the Cycle I ratings continued in Cycle II ratings.

promotional potential ratings are having an adverse impact on blacks. While many of the departments have a small number of total incumbents or black incumbents, it is significant to note that in 6 out of the 7 departments in which more than 20 blacks and 20 whites were rated, the disparities in the black/white pass rates were statistically significant. These include in Jefferson County: Cooper Green Hospital, Patient Care, General Services, and in Birmingham: Police, Streets and Sanitation, and Parks and Recreation (Pl. Ex. 70).

Plaintiff Exhibits 70 and 71 provide solid evidence that the promotional potential rating system used by the Board is having an adverse impact on blacks. Further, Plaintiff's Exhibit 29 reflects that all but 15 of the several hundred rating and reviewing officials are white. These facts show that Form 28B has operated and will continue to operate in a racially discriminatory manner so as to deny blacks an equal opportunity to aspire for and achieve promotions within the classified service.

In an effort to rebut the Government's impact statistics, the Personnel Board took the approach of analyzing separately each of the promotional announcements which were issued during the period of the effective life of the Cycle I ratings.[19] In Defendant Exhibit 360, for each announced examination, the ratings of employees in lower classifications to which the promotional exam was open were recorded and analyzed to measure adverse impact under the 80% rule and under the statistical test of chi-square. Based on this analysis, Mr. Kerr concluded that on some announcements the ratings had an adverse impact on blacks; on some there was "reverse" impact on whites, and on some there was no adverse impact (Tr. 581-82, Testimony of Joseph Kerr).

In Def. Ex. 360 the Board has attempted to link an employee's rating to a particular examination announcement when, in fact, promotional potential ratings are not administered in this manner. Rather, an employee is rated on a periodic basis every

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19 This approach resulted in the Board's considering the ratings that were given to only 1,382 (24.4%) of the 5,658 employees who received promotional potential ratings during Cycle I. (Pl. Exs. 71, 144), [sic] Moreover, this approach results in the exclusion of all of the ratings that were given to police patrolmen and deputy sheriffs, jobs which now include a sizeable number of blacks, solely because the promotion examination for Sergeant was not announced during the period covered by the Cycle I ratings.

six months, and the effect of a below 85 rating is total exclusion from promotional consideration for that period. The Board's myopic approach here has consequences that tend to distort the conclusions derived by Mr. Kerr from Def. E. 360.

By taking each job announcement as an individual entity to assess adverse impact, in many cases the sample size of candidates is so small as to provide useless data susceptible to misleading conclusions. In addition, several announced examinations during the period were open to the same pool of employees so that a particular employee's rating was counted several times in formulating the findings on impact. This multiple counting of a single rating led to n admitted problem of inflation of figures, such as in the case of five separate announcements for Head Nurse at Cooper Green Hospital where blacks in the lower classification of Staff Nurse had a higher passing rate than whites (Tr. 584, Testimony of Joseph Kerr).

To compensate for these deficiencies the Personnel Board later introduced Def. Ex. 412, which purported to analyze cumulatively the ratings given to employees listed in Def. Ex. 360, counting each rated employee only one time. However,the total figures used to assess adverse impact merely reflected the sum of the 2 X 2 contingency tables for each announcement in Def. Ex. 360, thereby failing to eliminate the problem of double-counting (Compare Def. Ex. 412 p. 1 with Def. Ex. 360, Table One, p. 5).

The Govenment [sic] did use the correct data in calculating the black/white passing rates of employees listed in Def. Ex. 360, counting each rating only once. The black pass rate was 75.6% of the white rate, and the disparity was far in excess of the .001 level of statistical significance (Pl. Ex. 144). Thus, even using the Board's approach of segregating the ratings to conform to particular announced examinations, the result is the same. The promotional opportunities of black employees are disproportionately adversely affected by the rating system.

In Defendant Exhibit 355 and the testimony of Joseph Kerr, the Personnel Board has introduced some evidence that certain jobs in the classified service are "dead-end" jobs[20] while

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20 "Dead-end" refers to jobs with no career ladder associated to it (Tr. 622, Testimony of Joseph Kerr). A complete listing as of May, 1974 appears in the back of Def. Ex. 355 under the title "Classes Not Normally Within Career Ladders." (Tr. 623).

others require additional formal education or training as a condition for advancement (Tr. 560-62; 583, Testimony of Joseph Kerr). Through this evidence the Board has attempted to foster the implication that promotional potential ratings are superfluous in these jobs and should not be counted in determining the adverse impact of the ratings. This approach was taken despite the assertion of the Personnel Director in his deposition that there are no jobs in which promotional potential ratings are given where most or all of the employees rated are not expected to be promoted (Deposition of Joseph Curtin, Vol. I, p. 93, Pl. Exhibit 33).

Moreover, the material contained in Def. Ex. 355 upon which the Board's implication rests is both misleading and irrelevant. Defendant Exhibit 355, dated 1975, states that it is based on the 1974 Career ladders and Lattices and incumbent figures at that time. The promotional potential rating system challenged by the Government was instituted in 1977, and this three year time lapse sheds doubt on the relevance and reliability of Def. Ex. 355's conclusions and implications. For instance, while Def. Ex. 355 lists a total of 111 employees in 1974 as being in the "dead-end" job of Clerical Assistant, Plaintiff Exhibit 1 shows 12 incumbents spread over four departments in that job in 1976 and Defendant Exhibit 349 lists 12 incumbents in 1979. Similarly Ex. 355 shows a total of 29 employees in the "dead-end" job of bailiff when the evidence reflects that in 1979 there are only four bailiffs employed by the County (Def. Ex. 349). The remainder of "dead-end" jobs listed in Def. Ex. 355 shows few incumbents. Thus, the effect of counting those "dead-end" jobs in determining the adverse impact of the ratings in 1977 could not have materially affected the outcome drawn from the data.

Another problem with Def. Ex. 355 is its failure to include jobs that were created subsequent to the 1974 Career Ladders and Lattices. Some of these include Dietary Aide and Housekeeping Aide, jobs which are heavily black and are promotable to Dietary Assistant, Cook's Helper or Housekeeping Assistant (Deposition of James Fields, Vol. I, pps. 49-51, Pl. Ex. 36).

Also in relying solely on the lines drawn by the Ladders and Lattices, defendants mislabeled certain jobs as requiring additional education or formal training. For instance, while the 1974 Ladders and Lattices show a Keypunch Operator re-

quiring additional education or training to promote directly to Data Processing Operator, the actual job announcement for Data Processing Operator states only that it is open to Keypunch Operators without requiring more education or formal training (Def. Ex. 360, p. 83). The same is true for Construction Equipment Operators going to Public Works Supervisor (See job announcement in Pl. Ex. 15).

These deficiencies in Defendant Exhibit 355, coupled with the Board's failure to offer any evidence that counting these allegedly "dead-end" jobs had any discernible effect on the Government's impact statistics, offer little in the way of a challenge to the Government's evidence of adverse impact.

Finally, the Board did not offer any evidence to attempt to validate the use of promotional potential ratings as a screening device for promotions. Given the highly subjective nature of Form 28B (See Depositions of Raters, Pl. Exs. 42-54) and the absence of professional participation in its development (Deposition of Joseph Curtin, Vol. I, p. 42-43; 64-65, Pl. Ex. 33), the failure of the Board to offer any evidence of its validity is a tacit admission of the impossibility of meeting that burden. In light of the Government's unrebutted evidence of the adverse impact of the promotional potential ratings upon black employees, the Board's use of the rating system has been a violation of Title VII.

B. Discussion

In the Government's Pre-Trial Brief we have discussed in detail the subjective and non-job related nature of the promotional potential rating form and the Title VII ramifications of having a predominately white rater group use this type of form to select candidates for promotion from among a pool of employees which includes blacks. The depositions of raters and reviewers (Pl. Exs. 42-54) establish that the ratings are administered in an arbitrary manner. As can be seen from the review of the evidence, the result is that the Board's promotional potential rating system has had an adverse impact on black employees.

The Government has presented evidence that reflects that blacks traditionally have been promoted in the classified service at a disproportionately lower rate than whites. (Pl. Ex. 16).

The Board has offered no evidence to show that despite the existence of a pattern of adverse ratings, blacks have been promoted at a rate equivalent to whites. Instead the Board contends that the Government's evidence falls short of showing an adverse "bottom line" selection rate, thereby insulating from challenge the adverse impact of the rating system itself. (Brief for Defs. pps. 31-32.) The Government submits that in the circumstances of this case such a showing of specific "bottom line" selection rates is not a necessary prerequisite for establishing adverse impact.

The *Uniform Guidelines*, *supra*, Sec. 4C, state that ordinarily when the total selection process does not have adverse impact, the individual components of the selection process should not be evaluated for adverse impact. The *Guidelines* qualify this statement with exceptions:

> However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances.

Uniform Guidelines, *supra*, Section 4C. See also *Questions and Answers #25 Uniform Guidelines*, 44 FR 11996, 12000 (March 2, 1979).

As we point out in our Pre-Trial Brief, it is well-established law in this Circuit that "procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks." *Parson* v. *Kaiser Aluminum and Chemical Corp.*, 575 F. 2d 1374, 1385 (5th Cir. 1978); *Wade* v. *Mississippi Cooperative Extension Service*, 528 F.2d 508 (5th Cir. 1976); *Pettway* v. *American Cast Iron and Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Rowe* v. *General Motors Corp.*, 457 F. 2d 348 (5th Cir. 1972). The clear weight of these and other decisions that have dealt with the administration of subjective evaluations such as the promotional potential rating form have found them to be not job-related and toosubjective. See also *James* v. *Stockham Valves and Fittings Co.*, 559 F. 2d 310 (5th

Cir. 1977); *Rogers* v. *International Paper Co.*, 510 F. 2d 1340, 1346 (8th Cir. 1975).

In light of an established line of cases that have condemned the use of non-job related subjective evaluation forms by white supervisors to evaluate black employees, the Board's continued use of an admittedly non-professionally developed promotional potential rating form, which adversely affects blacks, obviates the need to present evidence of the bottom line selection rates.

This is especially so in the circumstances of this case. The promotional potential rating system has been in existence only since August, 1977. An analysis of the bottom line selection rates in specific job classifications for the year and a half since Form 28B was instituted would not necessarily provide any probative information concerning the adverse impact of the ratings, since promotional activity confined to that period would not be sufficient to make reliable conclusions. Since the Government is challenging the future use of the rating system, it is reasonable to make the logical inference that the continuing racial disparity in promotional eligibility ratings will be reflected over time in the bottom line promotional rate. This inference is particularly compelling in light of the lack of evidence that any other element in the promotional process is having or will have a counter-balancing effect.

III. IN-SERVICE REQUIREMENTS

A. Restrictions on Promotions Between Municipalities

Section 664 of the 1940 Alabama Code (Recomp. 1958) provides, *inter alia*, that "[w]ithin the discretion of the director of personnel vacancies in positions shall be filled in so far as practicable by promotion from among employees holding positions in the classified service."

Rule 5.1 of the Personnel Board's Rules and Regulations provides, *inter alia*, that "vacancies in positions above the lowest rank in any category in the classified service shall be filled as far as practical by the promotion of employees in the service. The Director shall in each case determine whether an open competitive or promotional examination will serve the best interests of the service in attracting well qualified candidates." (Curtin Dep., May 22, 1979, exhibit 113)

The evidence reflects that the Personnel Board has traditionally followed a practice of maintaining separate promotional registers for each of the defendant municipalities and at times has also kept separate registers for various departments within a particular jurisdiction (Curtin Dep. May 23, 1979 Vol. 3, p. 302, Tr. 763-764). This practice was not required by State law and was not part of any collective bargaining agreement (Tr. Trans. 821, Curtin Dep. Vol. III, May 24, 1979, pp. 410-411)[.]

Under this system if, for example, a promotional examination is announced for heavy equipment operator and the examination is open to employees of the cities of Bessemer, Hueytown, Gardendale and Birmingham, incumbents in each of those jurisdictions who pass that promotional exam will be placed on a separate eligibles register (Tr. Trans. 720, 721 Pxs 93, 99, 120). Their rank on the register is based on the unweighted composite of their test score and their credits for years of classified service (up to a maximum of 20 years). See Sec. 664 of the Ala. Code 1940, Appendix Recomp. 1958, and Px 95. Thus a passing incumbent in Bessemer could theoretically receive a composite score of 75 on the promotional exam and rank number one on the eligible list in that jurisdiction, while an incumbent in the City of Birmingham whose composite score was 85 could rank in the middle or lower portion of the register for that jurisdiction.

Continuing the example, in filling a heavy equipment operator vacancy in Bessemer, the eligibles register for that jurisdiction must be exhausted before resort may be made to the eligibles register of another jurisdiction covered by the announcement. (Tr. Trans. 763-65, 822, 823)

It has been the policy of the Personnel Board wherever possible to fill promotional vacancies with incumbents on the eligibles register of the jurisdiction in which the vacancy occurs (see Deposition of Chris Doss, June 18, 1979, p. 35); and that on only infrequent occasions has the Board had to fill a promotional vacancy with an incumbent from another jurisdiction in the jobs covered by the plaintiffs in-service challenge. (Curtin Dep. May 23, 1979 Vol. 3, pp. 301-304; Tr. Trans. 711-727, 765, 830-834). Those jobs are: public works supervisor, construction equipment operator, heavy equipment operator, labor supervisor, refuse truck driver, and secretary (see Gov't. Pretrial Brief, pp. 39-42)[.]

This practice, in conjunction with the Board's practice of limiting promotional candidates to incumbents in the next lower

rated position(s) within the lines of progression established by the Board's career ladders and lattices (see section III B *infra*), has had a pronounced adverse impact on the promotion opportunities of blacks in both the classified and the unclassified service.

From 1972 through 1976 there were a total of 230 promotions to these positions throughout the classified service of which only 7 (3%) went to blacks. Those promotions separated by job and jurisdiction reveal the following:*

	Total	Black	% Black
1. Public Works Supervisor			
Jefferson County	7	0	0
Birmingham	11	0	0
	18	0	0
2. Construction Equipment Operator			
Jefferson County	38	1	2.7
Birmingham	15	0	0
Bessemer	2	0	0
Fairfield	1	0	0
Homewood	1	0	0
	57	1	1.8
3. Heavy Equipment Operator			
Jefferson County	39	1	2.6
Birmingham	28	2	7.1
Bessemer	8	0	0
	75	3	4.0
4. Labor Supervisor			
Jefferson County	27	1	3.7
Birmingham	16	0	0
Bessemer	8	0	0
Gardendale	1	0	0
Homewood	1	0	0
Midfield	1	0	0
	54	1	1.9
5. Refuse Truck Driver			
Birmingham	29	2	6.9
Bessemer	3	0	0
Fairfield	2	0	0
Gardendale	2	0	0
Midfield	2	1	50.0

	Total	Black	% Black
Mountain Brook	1	0	0
Tarrant	1	0	0
	40	3	7.5
6. Secretary			
Jefferson County	15	0	0
Birmingham	11	0	0
Health Dept.	5	0	0
Other Jurisdictions	4	0	0
	35	0	0

* The figures in this chart were taken from the printout that is in evidence as Plaintiffs' exhibit 16. This printout was used to compile Plaintiffs' summary exhibits 73 through 79. We wish to note here that there are a few slight discrepancies between this table and the figures contained on the summary exhibits due to typographical and/or computational errors. This table provides an accurate summary of information contained in Plaintiffs' exhibit 16[.]

Plaintiffs' summary exhibits 73 through 79 analyze in detail both the number and percentage of incumbent blacks in the classified and unclassified service who were precluded from eligibility to take the promotional examinations for these positions, and the number and percentage of incumbent blacks who would have been placed on separate promotional registers under the Board's current practices. Here we shall first illustrate, based on those summary exhibits, how the Board's practice of limiting competition for promotion to incumbents within a particular jurisdiction has adversely impacted on blacks.

The Personnel Board has traditionally filled heavy equipment operator vacancies by the promotion of individuals from the truck driver classification (Px 15, tb 2; Px 79 p. 1).

As seen from the above chart, during the period from 1972 through 1976 the County filled a total of 39 heavy equipment operator vacancies of which only 1 (2.5%) was filled by a black. As of October 1974 the County employed a total of 59 truck drivers of whom only 1 (1.7%) was black (Px 79, p. 6). As of May 1976, the County employed a total of 62 truck drivers of whom only 3 (4.84%) were black.

On the other hand, in the City of Birmingham there were a total of 74 truck drivers employed as of October 1974 of whom 15 (20.3%) were black (Px 79, p. 6). As of May 1976, 34 of 120 or 28.3% of the City's truck drivers were black (Px 79, p. 2)[.]

Moreover, the record reflects that since 1973 truck driver positions have generally been filled by the promotion of incumbents in the unclassified service (Px. 19). In the Jefferson County Public Works Department, which is where most if not all of the County's truck drivers are assigned (see Px 6, p. 1, Px 2, pp. 138-139), the unclassified service has been predominantly white. See Px 73, pp. 2, 5. See also Px. 28, deposition of Everett Armour p. 15 and exhibit 1 of his deposition; deposition of Willard Hogan, p. 22, and Px 20 the Jefferson County allocation list effective October 1, 1973. In contrast, the unclassified service in the City of Birmingham has been predominantly black (Px 73, pp. 3, 6).

Further, County of Public Works officials have admitted that jobs in the unclassified service in that Department have traditionally been filed [sic] by word of mouth referrals and referrals of friends and relatives (Dep. of Everett Ray Armour, June 19, 1979, pp. 8, 18-23, Dep. of Willard Hogan June 19, 1979, pp. 9, 10; Dep. R.D. Irvin June 18, 1979 p. 8).

Therefore, given the relatively small number of blacks who have been able to gain access to the entry level jobs in the county Public Works Department, the Board's in-service requirements will necessarily perpetuate a predominantly white work force in that Department.

B. Limitation of Promotions to Employees In the Next Lower Rated Job Classifications

The Board has traditionally followed a practice of limiting competition for promotions to incumbents in the next lower rated job classifications as prescribed by the Board's career ladder system (Curtin Dep. Vol. II, May 23, 1979, p. 309). This practice has also had an adverse impact on blacks in the lower rated and/or entry level positions on the ladder. See Plaintiffs summary exhibits 73-79. Moreover, the Board has presented no evidence that experience in the next lower rated classification on the career ladder is a necessary prerequisite for successful performance in the next higher rated position. Therefore, it has not demonstrated that this promotion practice is required by business necessity.

Set forth below is an illustration based on plaintiffs' summary exhibits 73-79 of how this policy of the Personnel Board in conjunction with its restrictions on transfers between jurisdictions has adversely affected the promotional opportunities of blacks.

Since at least 1967, construction equipment operator vacancies in Jefferson County have been filled through promotional announcements which for the most part have been limited to incumbents in heavy equipment operator and labor foreman positions. On at least one occasion the Board has extended promotional eligibility for this position to prison labor guards and senior equipment servicemen employed by the County. (See Px 15, Tab 1, p. 6). These nnouncements, however, have not been open to refuse truck drivers.

By way of contrast promotional announcements for construction equipment operator vacancies in the City of Birmingham have extended to incumbents in the jobs of refuse truck driver as well as heavy equipment operator and labor foremen [sic], (Px 15, Tab 1, p. 8). As of October 1974, 16% of the refuse truck drivers in the City of Birmingham were black (Px 73, Chart II, p. 3). As of May 1976 approximately 14% of the City's refuse truck drivers were black.

By further excluding truck drivers, semi-skilled laborers, and unclassified workers from promotional eligibility for the construction equipment operator examination, a substantial percentage of blacks in the City of Birmingham were totally precluded from competition for construction equipment operator positions both in Birmingham and in each of the other defendant jurisdictions.

The record reflects further that as of October 1974, 15 or 20% of the truck drivers of the City of Birmingham were black and 455 or 73% of the unclassified workers were blacks (Px 73, Chart II, p. 3).[21] There were no semi-skilled laborers working for the City as of that date (Px 73 Chart II p. 3)[.] As of May 1976, 34 or 28% of Birmingham's truck drivers were black and 41 or 68% of its semi-skilled laborers were black (Px 73, Chart I, p. 3). Of the City's 603 unclassified workers, 459 or 76% were black (Id.).

The evidence further reflects that individuals employed by the City of Birmingham in truck driving, semi-skilled-laborer, and unclassified laborer positions constitute a readily available pool from which to draw qualified candidates for construction

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21 The Government have [sic] not included in their [sic] summary exhibits unclassified workers employed in health or other unrelated occupations, nor has it included elected or appointed officials in the unclassified service.

equipment operator promotion examinations. See trial testimony of Trennon Nickerson 179-209, Mose Shine Jr. 218-231, Johnny Brown 283-296, James Purvis, 264-267.

As seen from the chart above, from 1972 through 1976 the County promoted 36 of its incumbents to construction equipment operator vacancies, none of whom were black (Px 74). The Director of Personnel has admitted by deposition that blacks employed the City of Birmingham would constitute a readily available labor pool for job vacancies in other jurisdictions. See Curtin Dep. May 23, 1979, Vol. 2, 357-358)[.]

The only reason given by the Director of Personnel for not extending promotional eligibility beyond the jobs listed in its announcements or to employees in other jurisdictions is the presence, in the Director's view, of sufficient numbers of qualified incumbents in the next lower rated job(s) and a desire to give first preference in promotions to incumbents within the same department or jurisdiction (Curtin Dep. Vol. 2, p.309, 315).

This hardly rises to the level of a showing of a business necessity for these practices. Furthermore, the Director of Public Works for Jefferson County, Mr. Chris Doss, testified by deposition that he would not object to allowing employees of the City of Birmingham to promote to positions in his department. Deposition of Chris Doss, June 18, 1979, p. 38. Doss further candidly admitted on his deposition that in his view the practice of filling promotion vacancies from among incumbents in his department has not had satisfactory results. Said Mr. Doss:

> "You see, the policy we have now, and I think the policy must be changed, it does not — it's not based on race or minorities or women. Very frankly, for the most part we are not getting the caliber of person coming in and working up through the ranks that public works has traditionally had. So I think that we are going to have to go to a more open recruiting or hiring basis. In other words, a lot of our advancement is limited to people within the system. I think that is going to have to be changed. Because we are not getting the quality of people on the lower levels that work themselves up . . . There is going to be a lot of rumblings when that is done but I feel it is essential" (Deposition of Chris Doss p. 33)[.]

C. The In-Service Requirements In the Birmingham Streets and Sanitation Department

Because of the historically heavy concentration of blacks in the unclassified jobs of the Streets and Sanitation Department of the City of Birmingham, coupled with the reclassification in 1975 of a sizeable number of these blacks into semi-skilled laborer positions in the classified service, the Board's in-service requirements for promotion have, in this Department, had their most severe adverse effect on blacks. From 1972 to 1976 the number of blacks and whites promoted into the jobs relevant to the in-service challenge in the Streets and Sanitation Department were as follows:

	Total	Wite	Black
Heavy Equipment Operator	25	23	2
Refuse Truck Driver	28	26	2
Labor Supervisor	14	14	0
Construction Equipment Operator	13	13	0
Public Works Supervisor	7	7	0
	87	83	4

(Px. 16)

Heavy Equipment Operator

Plaintiff Exhibit 79 analyzes for heavy equipment operator (HEO) the adverse impact of the in-service requirement, which restricted to truck drivers eligibility to compete for promotion to HEO. As of May, 1976, blacks comprised 29.20% (33/113) of the truck driver classification, the announced promotional pool for the HEO examination given in the Streets and Sanitation Department in March, 1975 (Px 79). However, if semi-skilled laborers were allowed to compete, the pool would be increased to 41.57% black (69/166), and the addition of unclassified laborers would make the pool 71.24% black (441/619) (Px 79).

In response to these statistics the Board offered no evidence to show that experience gained in the truck driver classification is a necessary prerequisite to the ability to compete for an HEO job. The Government, however, did present testimony that serving as a truck driver is not required to perform the job of HEO and that several blacks in semi-skilled and unclassified laborer positions have possessed the skills to at least be tested for HEO. James Purvis, former unclassified laborer, truck driver and HEO in the Streets and Sanitation Department and

current business manager for the union representing employees in that department, testified that his experience as a truck driver did not make him any more ready to take the HEO test than his experience as a laborer (Tr. 265, Testimony of James Purvis). He also testified that he knew of blacks in the unclassified service who were capable of operating heavy equipment (*Id.*). One of the men he named, Johnny Brown, testified that he had worked for 35 years in the Streets and Sanitation Department, all but one of which was as an unclassified laborer. Mr. Brown described how as an unclassified laborer in 1940 he operated the first bulldozer ever obtained by the City. He tesified that he continued to operate heavy equipment such as front end loaders and backhoes for many years until his retirement in 1976 (Tr. 284-290, Testimony of Johnny Brown). He also testified that he even taught men how to operate heavy rollers (Tr. 289), but was never allowed to take a test to promote directly to HEO (Tr. 291, Testimony of Johnny Brown).

Refuse Truck Driver

The job of refuse truck driver has always been restricted to candidates who are presently truck drivers (Px. 15). Thus, the identical statistical analysis of excluded promotional pools previously described for HEO is appropriate and was presented in Plaintiff Exhibit 78. The exclusion of unclassified laborers from eligibility to compete for refuse truck driver has been particularly repressive to the promotional opportunities of laborers who work on the garbage crews, virtually all of whom have been black (Tr. 181, Testimony of Trennon Nickerson; Tr. 259, Testimony of James Purvis). Mr. Purvis testified that there is no difference in driving a refuse truck from a regular truck and that in most garbage crews laborers get the opportunity to operate the refuse truck in a limited capacity (Tr. 266-267, Testimony of James Purvis). To require laborers who are familiar with the operation of a refuse truck to serve as truck drivers before being eligible to compete for refuse truck driver will continue to arbitrarily and adversely deny promotion opportunities to employees in the predominantly black unclassified service and in the heavily black semi-skilled laborer positions in the Birmingham Streets and Sanitation Department.

Labor Supervisor

As of December, 1978 there had never been a black labor supervisor in the Birmingham Streets and Sanitation Department (Pxs 17, 73). In a 1973 announcement, the promotional examination for this job in the City of Birmingham was open only to truck drivers and provisional labor supervisors (Px 15). The classification of semi-skilled laborer did not come into being in Birmingham until March, 1975. At that time the Personnel Board reclassified 62 unclassified laborers in the Streets and Sanitation Department, 39 of whom were black. Most of these employees were placed into the newly classified job of semi-skilled laborer (Pxs 20, 68), the others being declared truck drivers. Subsequent to this action no promotional announcement for labor supervisor was made until December, 1978 at which time semi-skilled laborers were allowed to compete (Dx 360)[.][22]

The important point here is that blacks in the unclassified service, especially those who were reallocated in 1975 to semi-skilled laborer, were denied the opportunity prior to that time to compete for promotion to labor supervisor. And of course, those employees remaining in unclassified positions continue to be excluded from promotional considerations. An example of the problem is Herman Copes, a black employee with the Streets and Sanitation Department since 1960, who testified that although he was a lead worker helping supervise a crew of laborers for thirteen years until his reclassification to semi-skilled laborer in 1975, he was not permitted to take the labor supervisor test as an unclassified employee (Tr. 299-300, Testimony of Herman Copes). Mr. Purvis further testified that most laborer crews continue to have leadworkers, who are unclassified and most of whom are black, who are qualified to take the labor supervisor test (Tr. 268, Testimony of James Purvis). Thus, the exclusion from the promotional pool of unclassified laborers, who are 82.12% black, continues the non-representation of blacks as labor supervisors (Px 76).

The existence of employees in laborer and semi-skilled positions who are qualified to sit for promotional examinations for refuse truck driver, HEO and labor supervisor has been confirmed by the Superintendent of the Streets and Sanitation

22 Plaintiff Exhibit 76, which analyzes the adverse impact of the in-service requirement for Labor Supervisor proceeded along the assumption that the excluded pools as of 1976 included semi-skilled laborer, since no examination announcement for the City of Birmingham subsequent to 1973 was produced by defendants during discovery. In light of the 1978 announcement contained in Defendant Exhibit 360, the post-1976 figures on adverse impact with respect to semi-skilled laborers may be in error, but with respect to the unclassified remain undiminished.

Department, Mr. Arnold Moncrief. In his deposition, Mr. Moncrief testified that he notified the Personnel Board that "he did not feel that the promotional opportunities were available to all of the men that should be there" because "it was almost impossible for a laborer or a semi-skilled laborer to go to labor foreman at that time, or heavy equipment operator, or refuse truck driver." (Deposition of Arnold Moncrief, p. 69, Px 37). Later he acknowledged that it is the in-service requirements that prevent semi-skilleds and laborers from being promoted and not a lack of qualified employees in those classes (Deposition of Arnold Moncrief, p. 95, Px 37).

Construction Equipment Operator

The in-service requirement for construction equipment operator (CEO) in the Streets and Sanitation Department is incumbency as a refuse truck driver or HEO (Px 15). As of December, 1978, there had never been a black CEO in Birmingham (Px 17, 73), and Plaintiffs' Exhibit 74 analyzes the adverse impact upon blacks of excluding the lower related classifications. As of 1976, the promotional pool for HEO and refuse truck driver was 10% black (6/60), and in 1978, 16.39% black (10/61) (Px 74). Based on 1976 figures, adding truck drivers would have increased the pool at that time to 22.54% black (Px 74). In 1978, the excluded pools of truck drivers, semi-skilled and unclassified laborer [sic] were, respectively 30.49%, 58.18% and 81.04% black (Px 74).

While these figures are persuasive in themselves, testimony established that there are several black truck drivers in the Streets and Sanitation Department who have performed capably as CEO's at the landfills for substantial periods of tie without commensurate compensation or hope of directly promoting to CEO. Trennon Nickerson testified that as a truck driver he had driven construction equipment at the New Georgia landfill since 1975 and full-time for seven of the last nine months before trial (Tr. 196-198, Testimony of Trennon Nickerson). Mose Shine, Jr., a truck driver, testified that his operation of construction equipment both at the Pratt City landfill and New Georgia landfill was extensive over the last several years (Tr. 220-222, Testimony of Mose Shine, Jr.). Two other black truck drivers have also had similar experience operating construction equipment out of their classification at the landfills (Pxs 132, 133; Tr. 202, Testimony of Trennon Nickerson).

The obvious qualifications of these black truck drivers to compete for promotion to CEO is admitted by their supervisor, who recommended to the Board that two years' experience as a truck driver at the landfill be sufficient requirement to take the CEO test (Px. 132, 133). The Personnel Board's investigation of the situation acknowledged "that the proportion of time spent in the operation of construction equipment by each of the named truck drivers (excepting Charles S. Jordan) is significant" and that these truck drivers "who have gained some skill in the operation of the equipment are called upon to provide some on-the-job training" to successful candidates promoted to CEO (Px. 134). Given these facts the Board recommended that they be paid CEO wages when performing such duties and that a new CEO position be created at the landfills (Px. 134). However, the Board refused to grant them eligibility to take the promotion examination for construction equipment operator even though it knew that these blacks were qualified candidates for that job.

Evidence of "adverse impact" notwithstanding, we submit that these facts constitute evidence sufficient to infer an intent on the part of the Board to discriminate against blacks in this area. This inference is not difficult to make, especially when the Board's actions are contrasted with the policy statement made in deposition by Mr. Fields, Deputy Director. There, in discussing why the job of CEO is promotional, he said:

> . . . but when we have people in the service who have had some experience in this type of operation, who are doing a real good job, and who have probably operated some of this equipment during sicknesses or absences or vacations of fellow workers, who have been trained to operate it and who have done well in performance at a lower level, [they] deserve an opportunity to qualify for the examination.

(Deposition of James Fields, April 5, 1977, pp. 96-97, Px 35).

Public Works Supervisor

The record concerning the in-service requirements for the classification of public works supervisor shows that in changing the announced line of promotion in 1975, the Board intentionally disregarded the known consequence that blacks would be excluded from consideration for that position. Until 1975 the in-service requirement for promotion to public works supervisor was permanent status as either a labor supervisor, HEO, CEO, or refuse truck driver (Px. 15). In 1975 the Board changed the requirement to include only those candidates with permanent

status as a construction supervisor or senior sanitation inspector or a labor supervisor with three years experience or a CEO with three years experience in a combination of CEO, HEO, labor supervisor or refuse truck driver (Px. 15).

There has never been a black public works supervisor in the Streets and Sanitation Department (Px 75). All 27 current incumbents are white (Px. 17)[.] Both as of May, 1976 and December, 1978, there were no black incumbents in the announced promotional pool (Px 75). However, if the lines of promotion had not been changed by the Board in 1975, 8 blacks, who comprise 23.53% of refuse truck drivers, and 2 black HEO's would be eligible presently to compete for public works supervisor (Px. 75).

The circumstances surrounding the Board's decision to change the lines of promotion indicate that its unilateral action was taken against the objections of the Superintendent of the Streets and Sanitation Department and with full cognizance that promotional opportunities for blacks would be eliminated. Mr. Fields testified that based solely upon his review of position classification questionnaires and a conversation with the consultant who performed the five year survey in 1974, he decided to drop refuse truck driver from the line of promotion (Deposition of James Fields, Vol. II, p. 97, May 25, 1979, Px 36). The purported basis for this deletion was that refuse truck drivers do not receive the knowledges [sic], skills and abilities needed to perform the job of public works supervisor, *as far as construction and maintenance is concerned* (*Id.* p. 91). However, when notified of the proposed change, the Superintendent of the Streets and Sanitation Department pointed out in a letter to the Board that since more than 50% of the work done in the department and the tasks considered most important involve the collection and disposal of solid waste, he favored the continuation of the direct line of promotion from refuse truck driver, (Deposition of James Fields, *supra*, Dep. Ex. 12). The Superintendent also opposed the addition of three years' labor supervisor experience (*Id.* Dep. Ex. 11), a requirement which Mr. Curtin testified as being unusual in the civil service system (Tr. 819, Testimony of Joseph Curtin).[23]

23 It is also significant to note that the additional in-service requirement suggested by the consultant was 2-4 years experience in public works maintenance (Deposition of James Fields, *supra*, p. 123). It was the Board's decision alone to formulate the specific requirement of three years' experience as labor supervisor, an all-white classification.

The absence of any viable justification for the deletion of refuse truck driver from the line of promotion is further evidence of the Board's intent to discrminate against blacks in this area.[24] Many present public works supervisors in the Streets and Sanitation Department promoted to that position from refuse truck driver without experience in other classifications which involved construction and maintenance (See Depositions of Public Works Supervisors, Px 42-50; Tr. 625, Testimony of Joseph Curtin). In deposition they stated uniformly that eliminating refuse truck drivers from promotional considerations was unreasonable (Deposition of Lem Odom, p. 9, Px 50; Deposition of Hugh Faucett, pp 7-8, Px 42; Deposition of Claude Massey, p. 32, Px 45; Deposition of Robert Woods, p. 48, Px 46; Deposition of Paul Henson, pp. 10-11, Px 43). Mr. Purvis testified that refuse truck drivers receive the same type of supervisory experience as labor supervisors and should be eligible to take the test for public works supervisor (Tr. 269, Testimony of James Purvis).

In redrawing the lines of promotion in 1975, both Mr. Curtin and Mr. Fields have admitted that they were aware that there were several black refuse truck drivers and a substantial number of blacks beginning to move into truck driver and semi-skilled positions (Deposition of Joseph Curtin, Vol. IV, p. 629, Px 33; Deposition of James Fields, Vol. II, p. 131, Px 36). Mr. Curtin testified at trial that he is aware that the in-service requirements adopted by the Personnel Board mean that no blacks are eligible to take the public works supervisor examination (Tr. 842, Testimony of Joseph Curtin). Despite this knowledge of the direct consequences to black refuse truck drivers and HEO's, and despite the lack of any necessity for a change in the line of promotion to public works supervisor in the Streets and Sanitation Department, the Board changed that line. As anticipated, the result has been to bar qualified black employees from taking the examination for public works supervisor (Tr. 246, Testimony of Alfred Mennifield; Tr. 313, Testimony of Willie Gossum; Tr. 345, Testimony of Clyde Hill; Tr. 366, Testimony of Major Florence; Tr. 426, 429, 430, Testimony of Cleo Lewis). With this line of promotion, the supervisory level in the Streets

24 Mr. Fields testified that he did suggest the creation of a new classification called refuse collection foreman but that the Superintendent of Streets and Sanitation balked at the idea because it would be a "dead end" position and he wanted interchangeability at the supervisory level. In *this* instance, the Board acceded to the wishes of the Superintendent.

and Sanitation Department will continue to be maintained as an all-white classification.

Based on the foregoing we submit that the Personnel's [sic] Board's in-service requirements have had a severe adverse impact on blacks in the Birmingham Streets and Sanitation Department. We further submit that the Board's conduct with respect to the administration and maintenance of those requirements in this Department was such as to infer an intent to discriminate against blacks. See e.g. *Columbus Board of Education* v. *Penick*, ___ U.S. ___ 47 USLW 4924, 4927-28; *Washington* v. *Davis*, 426 U.S. 229, 239-41 (1976)[.]

Such an inference of racial intent may and properly should be drawn when as here an employer engages in acts which reasonably and foreseeably result in an adverse impact on blacks and where it has been put on notice that there is no apparent justification for such acts. See *Columbus Board of Education, et al.* v. *Penick, et al., supra* 47 USLW at 4927 n. 11.

D. Discussion

The In-Service Requirements of The Personnel Board Are Not Immune From Challenge Under Section 703 (h) of Title VII

The Board's practice of giving "preference" to the promotion of eligibles in the next lower rated job(s) and/or within the same department or jurisdiction is not, nor does it rise to the level of, a "seniority system" entitled to the Congressional immunity afforded by §703(h) of Title VII.

In its decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977) the Supreme Court was careful to point out that under its earlier decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) employment practices, such as the one challenged here, which are "fair in form but discriminatory in operation" will generally be found to be in violation of Title VII absent a showing of business necessity[,] 431 U.S. at 349. Cf. *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977). While the Court went on to acknowledge that the departmental seniority provisions contained in the collective bargaining agreements between the employer and the union in that case had a racially discriminatory

effect, they were nevertheless not subject to attack under Title VII because of the legislative immunity granted by §703(h).[25]

Since *Teamsters*, the appellate courts have, for the most part, narrowly construed the coverage of 703(h) to include only practices which are directly linked to seniority provisions contained in collective bargaining agreements. *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1188-94 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 1020 (1979); *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, on rehearing 503 F.2d 132 (5th Cir. 1978), *cert. denied* 47 U.S.L.W. 3761 (May 21, 1979); *Patterson* v. *American Tobacco Co.*, 586 F.2d 300 (4th Cir. 1978), pending rehearing in banc (Nos. 78-1088, 78-1084); *United States, et al.* v. *Lee Way Motor Freight Inc., et al.*, ___ F.2d ___ (10th Cir. 1979) 20 FEP Cases 1345, 21 EPD ¶30,286; *Bryant* v. *California Brewers Association, et al.*, 545 F.2d 421, 427 (9th Cir. 1978), certiorari granted, 62 L. Ed. 2d 282. But see, *Alexander* v. *Aero Lodge 735, International Assn. of Machinists*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied* 436 U.S. 946 (1978). See also *Acha* v. *Beame*, 531 F.2d 648, on rehearing 570 F.2d 57 (2nd Cir. 1978) extending 703(h) coverage to seniority systems established by State law.

These Courts have found outside the coverage of 703(h) restrictions in union contracts governing transfers between departments, *Parson, supra*, collectively bargained restrictions on eligibility for promotions within lines of progression, *Patterson, supra*, and employer rules prohibiting transfers between departments, *Lee Way supra*.

In this case the Board's decision to institute the practice of giving first preference on promotions to incumbents in the next lower rated jobs in the departments or jurisdictions in which a vacancy arises was made unilaterally. It was not collectively bargained, and as we have seen above, it was not specifically required by State law.

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25 §703(h) provides in pertinent part:

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice, for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, *** [sic] provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin***[sic].

We submit this practice does not differ in operation to any significant degree from the restrictions on transfer between departments and within lines of progression which were found to fall outside the coverage of §703(h) by the courts of appeals in *Parson*, *Patterson*, and *Lee Way*. Furthermore, since this practice was neither collectively bargained nor required by State law, the Board's claim of immunity for it under §703(h) is even less substantial than the claims raised by the employers and unions in the cases cited above.

In its Brief (p. 54) the Board argues, without reference to any authority, that each of the defendant municipalities are "separate employer(s)" and therefore each "has the right to maintain a line of progression separate from all other employers." However, there is no evidence that any municipality initiated or sought the restrictions here in question. On the contrary, the evidence indicates that the Personnel Board alone determined this policy.

Furthermore, each of these municipalities relies on the Personnel Board for the initial screening, testing and certification of candidates for promotion vacancies. Moreover, the Board in its discretion can elect to fill a promotional vacancy through an open competitive examination if it determines there are no qualified incumbents available for the job (Tr. Trans. 768, Personnel Board Rule 5.1)[.]

Since the content and duties of the jobs challenged here are alleged by the Board to be generally uniform in character throughout all of the defendant jurisdictions, and since vacancies in those positions are filled through the Board's centralized testing and certification procedures, there is no merit to the Board's arguments here. See *Russell* v. *American Tobacco Co.*, 528 F.2d 357, 362-63 (4th Cir. 1975); *Patterson* v. *American Tobacco*, *supra*, 535 F.2d at 266.

In sum, since the practice challenged here, which has been shown to have an adverse impact on blacks, is not part of and does not stem from a bona fide seniority system protected by 703(h), it is unlawful under Title VII. If this practice is allowed to continue it will in our view virtually insure the continuation of a predominantly white work force in the jobs challenged here by the plaintiffs. Such a result would be directly contrary to the primary purpose of Title VII which is "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job

environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973).

IV. CREDITS FOR YEARS OF CLASSIFIED SERVICE ON PROMOTION EXAMINATIONS

A. Evidence of Adverse Impact on Blacks

1. Racial Composition of the Classified Service Prior to 1972

As of January 1, 1966 there were a total of 3,430 employees in the classified service in all of the jurisdictions covered as of that date by the Jefferson County Personnel Board civil service system. Sixty-six or 1.9% of these employees were black (Dx 302)[.]

As of January 1, 1966 the City of Birmingham employed approximately 1,689 employees in the classified service of whom 10 (.59%) were black. All of these blacks were employed in the Parks Department (Dx 302).

As of January 1, 1966, Jefferson County employed approximately 1037 employees in the classified service of whom 23 (2.3%) were black. Of these 23 blacks, 14 were employed in the County Home, all as practical nurses; 6 were employed by the Juvenile Court as either juvenile supervisors or probation officers, and 3 were employed in the Engineering Department (bridge construction) as bridge maintenance men.

As of January 1, 1966 the Health Department employed approximately 257 classified employees of whom 33 (12.8%) were black. These blacks were employed primarily in the positions of registered nurse and nursing assistant (Dx 302).

Plaintiffs Exhibit 66 is a chart which identifies the total number of minorities employed by each of the defendant jurisdictions as of November 1967, July 1969, July 1970, July 1971 and July 1977. That exhibit is based on Personnel Board Exhibit 304 which contains the only information in the Board's files reflecting the racial composition of the classified service from 1967 through 1972. (Tr. Trans. 456-461). Exhibit 304 also does not further identify minorities by racial group. However, the Government concedes for purposes of this trial that the minority employee totals contained on that exhibit are for the most part reflective of the total number of black employees in the classified service.

Plaintiffs' exhibit 64 is a chart which identifies the total number of classified and unclassified employees in each of the defendant jurisdictions as of the end of each fiscal year (September 30) for the years 1967 through 1972.

Comparison of the total number of minorities in the classified service by jurisdiction as contained in Px 66 with the total number of classified employees by jurisdiction as contained in Px 64 reflects the following:

Minorities in the Classified Service (1967 - 1972)

Jurisdiction by Year	1967	1969	1970	1971	1972
1. Jefferson County					
Total Class'd.	1,205	1,337	1,417	1,479	1,863
Minority Class'd.	23	49	53	64	204
% Minority	1.9	3.7	3.7	4.3	11.0
2. Board of Health					
Total Class'd.	303	319	322	331	355
Minority Class'd.	49	51	62	65	65
% Minority	16.2	16.0	19.3	19.6	18.3
3. Birmingham					
Total Class'd.	1,764	2,015	2,046	2,187	2,374
Minority Class'd.	28	69	109	113	148
% Minority	1.6	3.4	5.3	5.2	6.2
4. Bessemer					
Total Class'd.	230	251	257	262	282
Minority Class'd.	0	4	6	8	2
% Minority	0	1.6	2.3	3.1	.7
5. Fairfield					
Total Class'd.	57	55	60	64	63
Minority Class'd.	1	1	1	1	1
% Minority	1.7	1.8	1.7	1.6	1.6
6. Homewood					
Total Class'd.	83	96	101	106	112
Minority Class'd.	2	11	8	9	10
% Minority	2.4	11.5	7.9	8.5	8.9
7. Hueytown					
Total Class'd.	17	19	20	20	21
Minority Class'd.	0	0	0	0	0
% Minority	0	0	0	0	0

Jurisdiction by Year	1967	1969	1970	1971	1972
8. Mountain Brook					
Total Class'd.	78	84	91	92	96
Minority Class'd	0	0	0	1	0
% Minority	0	0	0	0	0
9. Tarrant					
Total Class'd.	34	35	35	37	39
Minority Class'd.	0	0	0	1	1
% Minority	0	0	0	2.7	2.6
10. Fultondale					
Total Class'd.	N/A*	N/A	N/A	33	32
Minority Class'd.	N/A	N/A	N/A	0	0
% Minority	-	-	-	0	0
11. Gardendale					
Total Class'd.	N/A*	N/A	N/A	36	34
Minority Class'd.	N/A	N/A	N/A	0	0
% Minority	-	-	-	0	0
12. Pleasant Grove					
Total Class'd.	N/A*	N/A	N/A	48	41
Minority Class'd.	N/A	N/A	N/A	1	0
% Minority	-	-	-	2.1	0
13. Midfield					
Total Class'd.	N/A*	N/A	N/A	31	34
Minority Class'd.	N/A	N/A	N/A	0	0
% Minority	-	-	-	0	0
14. Vestavia Hills					
Total Class'd.	N/A*	N/A	N/A	61	62
Minority Class'd.	N/A	N/A	N/A	5	5
% Mnority	-	-	-	8.2	8.1
TOTAL (all Jurisdictions)					
Total Class'd.	3,771	4,211	4,349	4,787	5,408
Minority Class'd.	108	185	239	268	436
% Minority	2.9	4.4	5.5	5.6	8.1

*These jurisdictions did not come under the coverage of the Jefferson County Personnel Board civil service system until1971.

The increase in minority employment in the classified service between 1967 and 1972 occurred primarily in Jefferson County and the City of Birmingham (Px 66). Within the City of Birmingham, the increase in minority classified employees occurred primarily in two departments, Parks and Police. In Jef-

ferson County this increase occurred primarily in three departments, the County Home, Family Court and Mercy Hospital[.]

Mercy Hospital was opened in 1972 (Px 66, Trial trans. 586). During 1972, at least 119 minorities were hired into this department (Px 66). This was the primary factor in the increase in the percentage of minority employees in Jefferson County from 4.3% in 1971 to 11.0% in 1972.

2. Racial Composition of the Classified Service After 1972

From 1973 through 1975 the percentage of blacks in the classified service rose from approximately 9% to over 16% (Dxs 307, 309, 313)[.]

A sizeable portion of this increase was attributable to the reclassification into the classified service of blacks formerly employed in the unclassified service (Px 20, Px 68). During this period of time over 200 blacks were added to the classified service through reclassification (Px 20, Px 68).

Important to this issue is the fact that these blacks were not given any credit for purposes of promotion within the classified service for their years of unclassified service (Tr. Trans. 776-779; Curtin Dep. Vol III, May 24, 1979, pp. 411-417)[.]

With the exception of Bessemer, there does not appear to have been a significant increase in the number of blacks employed in the classified service after 1972 in the smaller jurisdictions. As of May 1976 those jurisdictions employed the following number of blacks in the classified service (Px 65).

	Total	Black	% Black
Bessemer	291	25	8.6
Fairfield	69	3	0
Fultondale	46	0	0
Gardendale	41	0	0
Homewood	145	8	5.5
Hueytown	34	0	0
Midfield	37	2	5.4
Mountain Brook	132	4	3.0
Pleasant Grove	53	0	0
Tarrant City	58	3	5.5
Vestavia Hills	83	5	6.0

Plaintiffs Exhibits 67 and 147 are charts which reflect the average years of classified service seniority as of 1977 of whites and blacks in certain selected departments and jurisdictions.

Those departments and jurisdictions were selected on the basis of the proportion of blacks in those departments and the amount of promotion opportunities occurring in those departments (See Tr. Trans. 49-51). Plaintiffs [sic] exhibit 67 is based on total years of classified service while exhibit 147 computes years of classified service up to 20 years to reflect the Board's policy of not awarding credit on promotion examinations for time spent in the classified service beyond 20 years.

Both exhibits 67 and 147 reflect a significant and substantial disparity between the average years of classified service of whites and blacks. For example, exhibit 67 reflects that as of 1977 blacks in the Street and Sanitation Department of the City of Birmingham had an average of 3.0 years of classified service while whites in that department had an average of 12.1 years of classified service. Exhibit 147 shows the same average for blacks. The white average is 11.1 years.

B. Discussion

In our Pre-Trial Brief (pp. 27-30) we set forth in detail our arguments that the Board's practice of adding to test scores on promotion examinations points for years of classified service is in operation a selection device that is covered by the Uniform Guidelines on Employee Selection Procedures. This is because it is being used as a means of determining the relative qualifications and rank order of candidates for promotion.

In our Pre-Trial Brief we also discuss at length our arguments as to why this system should not be viewed as a seniority system within the meaning of §703(h). That discussion need not be reiterated here. We also believe the recent decisions of the courts of appeals interpreting §703(h), referred to in our discussion of the in-service requirements also support our arguments here.

However, we wish to stress here that even if this Court finds that the Board's practice of awarding credits on promotional examinations based on length of service properly falls within the meaning of a "seniority system" as prescribed by §703(h) of Title VII, the Board's decision to disallow any credits on promotion examinations for years spent in the predominantly black unclassified service was an act of disparate treatment based on race. As such it constituted an independent and willful violation of Title VII. See *Allen* v. *Amalgamated Transit Union, Local 785*, 554 F.2d 876, *cert. denied* 434 U.S. 891; *Peters* v. *Missouri-Pacific Railroad Co.*, 483 F.2d 490, *cert. denied*, 414 U.S. 1002

(1973). *Cf. Washington* v. *Davis*, 426 U.S. 229, 239-41 (1976); *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 266-8 (1977); *Columbus Board of Education* v. *Penick*, ___ U.S. ___, 47 USLW 4924, 4928 (July 2, 1979).

The Director of Personnel, Mr. Joseph Curtin, admitted at trial that in the past the Board has routinely credited for promotion purposes the full length of service of employees of the smaller municipalities who have entered the classified service through the process of "inclusion". This procedure is discussed further in our Pre-Trial Brief at p. 46 fn. 19. The employees of these municipalities were virtually all white (See Defendant Exhibit 304).

Curtin also admitted at trial that in his mind there was no "real degree of difference" between the procedures by which these employees were brought into the classified service and the procedures followed by the Board in bringing unclassified workers into the classified service (Tr. Trans. 779).

Curtin further admitted that when the unclassified workers were brought into the classified service they were given credit for their years of unclassified service for purposes of vacation and sick leave. When asked why they were not given similar credit for promotions, Curtin's only response was that he was acting on the advice of legal counsel (Tr. Trans. 778-779, 816), and that he didn't know what that opinion was based on (Tr. Trans 816). The Board presented no evdence of either the contents or basis of that opinion.

Finally, it is important to point out that the Board's decision to credit the full length of service of employees who entered the classified service through "inclusion" was discretionary and not required by State law. Section 10 of Act No. 248 of the Alabama State Legislature (1945), as amended, which is referred to in its entirety at p. 47 fn. 21 of the Personnel Board's brief, provides, *inter alia*, that:

> "[If] . . . at the time such municipality or other appointing authority becomes subject to the provisions of this subdivision it then has in its employ employees or appointees *who would come within the classified service* as defined in this subdivision, the Board in its discretion may extend or grant permanent status to any or all such employees or appointees." (Emphasis supplied).

Since the Board similarly had to determine whether employees in the unclassified service were performing jobs which "would come within the classified service" prior to their inclusion, the Board has presented no legitimate nonracial reasons for its disparate treatment of these workers, the majority of whom were black (Px. 68)[26]. *Allen* v. *Amalgamated Transit Union, supra*; *Peters* v. *Missouri-Pacific Railroad Co., supra.*

V. DISCRIMINATION AGAINST WOMEN

A. Post-Act Sex Restrictions In Job Announcements and Certifications

With the exception of juvenile supervisor and nurses aide the Personnel Board has presented no proof that sex was a bona fide occupational requirement for its practices of including gender restrictions in its job announcements and certifications after the effective date of the 1972 amendments to Title VII.

The record unequivocally reflects that after the Board became subject to the legal obligations imposed by Title VII it pursued these practices in the following positions: police patrolman (male), deputy sheriff (male), firefighter (male), warden (male), correctional officer (male), police woman (female), police radio dispatcher (male), radio dispatcher (male), facilities cashier (male), watchman (male), senior clerk (male), police property clerk (male), intermediate clerk (male), water pollution-inspector (male), tax agent (male), probation aide (male), probation officer (male), recreation leader (male), senior recreation leader (male), recreation center director (male), housekeeping aide (male), laundry worker (male), dietary aide (male), nurses aide (male), and juvenile supervisor (male) (See Pxs 9, 11).

These willful and admitted sex restrictions constituted a violation of Title VII absent a showing that they constituted bona fide occupational qualification requirements for those jobs. *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969); *Diaz* v. *Pan American World Airways*, 442 F.2d 385 (5th Cir.) *cert denied* 404 U.S. 950 (1971); *Blake* v. *City of Los Angeles* 595 F.2d 1367, 1377 (9th Cir. 1979).

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26 The unclassified service has by tradition been between 75% and 85% black (Dx 305). Of the 632 unclassified workers who to date have been reclassified into the classified service 421 or (67%) are blacks (Px 68, Px 20)

In its Brief (pp. 55-60) the Board attempts to obfuscate its failure to go forward with any proof establishing a bona fide occupational qualification (BFOQ) defense for these practices by mounting the spurious argument that the government has failed to establish statistically any "adverse impact" on women in these jobs. In advancing this argument the Board asserts that in many instances if one were to look at these jobs across jurisdictional lines or to lump them into certain EEO categories (i.e. professional/technical) there would be no significant gender imbalance. In other instances, such as policewoman and police patrolman, the Board asserts there is now no gender imbalance or "adverse impact" because these jobs were merged in late 1974.[27] Finally, in those positions where there were selective certifications based on sex there were in many instances more females certified than males.

All of this overlooks the fact that in each instance where the Board issued a "male only" or "female only" job announcement or reported to a "male only" or "female only" eligibles register for certifications, it was making an employment decision on the basis of sex, not merit. As such it constituted an unlawful employment practice under Title VII absent a showing that sex was a BFOQ for those employment decisions. *Dothard* v. *Rawlinson*, *supra*; *Blake* v. *City of Los Angeles*, *supra*. See also, *Marshall* v. *Kirkland*, 602 F.2d 1283, 1298-1301 (8th Cir. 1979).

Moreover, a careful examination of the record indicates that in many instances these selective certifications were made to fill "male only" positions within a particular department or jurisdiction. Since the job titles in the classified-service [sic] cross departmental and jurisdictional lines, combining for purposes of statistical comparison all of the employees in the job title masks the intentional exclusion of women from those jobs in the departments and jurisdictions which requested male only certifications.

For example, the record reflects that after 1972 and as recently as May, 1975, the Board issued separate announcements for police radio dispatcher positions limited to males only in the jurisdictions of Fultondale, Gardendale, Mid-

27 We note that as of October, 1976, almost two years after the merger of those classifications, only 32 or 3.7% of the 857 police officers and deputy sheriffs employed in the Jefferson County Civil Service System were women. (Px 2)

field, Mountain Brook and Tarrant (Px 9, pp. 23, 28). As of approximately October, 1976, all of the police radio dispatchers in these jurisdictions were males (Px 2, p. 23; See also Curtin Dep. June 18, 1972 Vol. IV, pp. 547444; See also Tr. Trans. 754-755).[28] As of that same date there were women employed as police radio dispatchers in some of the other jurisdictions (Px 2, pp. 22, 23).

In other male only announcements, such as facilities cashier (Px 9, p. 1), the Director of Personnel testified by deposition that this announcement was for positions in certain departments which were "physically isolated" and in "fairly high crime areas" which "indicated it would be a high risk category to a female" (Deposition of Joseph Curtin, June 18, 1979, Vol. IV p. 540-541).

Similarly, in instances where the Board selectively certified males for certain jobs such as water pollution inspector, intermediate clerk, and tax agent, they were for positions in particular departments such as finance in the City of Birmingham and public works in Jefferson County (see Curtin Dep. Vol. III, May 24, 1979 pp. 511-513). In explaining by deposition the reasons for the selective certification of only males for water pollution inspector positions in the Public Works Department of Jefferson County, Curtin testified, *inter alia*, that:

> "The male only designation was based on the duty assignment, and particularly geographical terrain in which that inspector had to traverse in order to take water pollution samples, very rough terrain, very deep woods, snake infested, environmental considerations on this, and stamina" (Curtin Dep. Vol. III, May 24, 1979 p. 511)[.]

Finally, in instances where the Board engaged in selective certifications of males and females for the same job within the same department, such as nurses aides and juvenile supervisors, the fact that more females may have been certified and employed in those jobs than males cannot as a matter of law absolve the Board from its obligation to establish a BFOQ justification for such intentionally sex based practices. Indeed, if one were to pursue the logic of the Board's "adverse impact" arguments here

28 Px 2 is a computer printout listing employees by job. The printout lists the jobs within each jurisdiction by jurisdiction number. The numbers for these five jurisdictions are Fultondale (006), Gardendale (007), Midfield (010), Mountain Brook (011) and Tarrant (013). See Px. 6.

it would appear to countenance under Title VII the certification of only blacks for nurses aide positions in a predominantly black ward of Mercy Hospital and only whites to a predominately white ward. Under the Board's reasoning if there was no racial imbalance in the job and thus no "adverse impact", it could continue to follow such a racially based certification and assignment system. Such a result would clearly be at odds with the underlying purpose of Title VII which is to assure equal employment opportunities for all citizens regardless of race or sex. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973).

B. The Board's BFOQ Defense For Nurses Aides and Juvenile Supervisors

Nurses Aides

At trial the Director of Personnel, Mr. Curtin, testified that in his opinion the selective certification of male nurses aides for assignment to positions which involved the care and lifting of non-ambulatory patients was based on a bona fide occupational qualification requirement. The only evidence offered by Curtin in support of his opinion was a summary exhibit purporting to represent the number of days absent from work of male and female nurses aides from 1975 through 1979 because of lower back injuries (See Dx 121).

However, we submit this exhibit neither clearly supports the basis for Curtin's opinion nor does it constitute sufficient evidence to establish a BFOQ defense.[29]

Curtin admitted that there is a substantially higher proportion of female nurses aides than male nurses aide [sic] (Tr. Trans. 752). Thus it is not surprising that there would be a higher number of women incurring work related injuries, including lower back injuries, than men.

More importantly, Curtin admitted that the figures contained on the summary exhibit fail to reflect the number of lower back injuries that were directly attributable to lifting nonamulatory [sic] patients from those attributable to other causes

29 Moreover, as a matter of law, a BFOQ defense cannot be applied to jobs which turn on the ability of an individual to engage in heavy lifting or other physical acts. Instead, a BFOQ defense has to be related to the *uniqueness* of a particular sex to perform a particular set of tasks, such as females to play female leads in theatrical productions. See *Weeks* v. *Southern Bell Telephone & Telegraph Co. supra*; *Phillips* v. *Martin Marietta Corp.* 400 U.S. 542 (1971)

(Tr. Trans. 808-809). Further, the exhibit contains only 3 recorded lower back injuries for men. Thus any inference that there is a correlation between sex and the number of days absent from work because of lower back injuries is suspect because of the small number of lower back injuries incurred by males.

Finally, the Board presented no evidence to indicate that it would be impractical to administer a qualifying physical examination and/or to review the applicant's medical history to determine on an individual basis the physical fitness of both men and women to effectively perform the duties of this job.

We submit then that the Board has failed to establish a BFOQ defense for its filling vacancies in this job on the basis of sex. *Dothard* v. *Rawlinson*, *supra*; *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, *supra*; *Diaz* v. *Pan American World Airways*, *supra*. See also *Marshall* v. *Kirkland*, *supra*. As we point out in our Pre-Trial Brief (pp. 45-47), the burden of proving a BFOQ defense is a heavy one. The Board has not met that burden here.

Juvenile Supervisor

The only evidence presented by the Board to establish a BFOQ defense for this position was the testimony of the Chief Probation Officer of the Jefferson County Family Court, Mr. A.C. Conyers.

Conyers testified that in his opinion and based upon his experience as the Chief Probation Officer that it was necessary to employ only males to supervise boys in detention and only females to supervise females in detention.[30] Conyers based this opinion on (1) his view that only males could safely supervise boys in detention between the ages of 16 and 18, some of whom, according to Conyers, had a tendency to engage in violent and antisocial behavior;[31] and (2) the need to have male "role models" for boys in detention.

30 The transcript of this part of the trial has yet to be forwarded to the parties. Thus we are relying upon our notes as to the substance of Conyer's testimony.

31 Conyers appeared to acknowledge in his testimony that this problem was largely attributable to a change in State law that became effective sometime in 1977 which raised the age limit for juveniles in detention from 16 to 18. Thus, this asserted reason for certifying only males to supervise boys in detention is of recent vintage and provides little support for the Board's prior and traditional practice of staffing and segegating these jobs on the basis of sex.

As to the first issue, no specific evidence was presented that would reflect the incidence of violence among boys in detention in the County Home, nor was there any evidence of the degree to which such acts of violence required a physical response on the part of the juvenile supervisor. Moreover, no evidence was presented that would establish that only men could safely and effectively respond to such acts. See *Reynolds* v. *Wise*, 375 F. Supp. 145 (N.D. Tex. 1974) and *Tracy* v. *Oklahoma Department of Correction*, 10 FEP Cases 1031 (W.D. Okla. 1974)[.]

Similarly as to the allged [sic] need to have male "role models" for boys in detention, no direct evidence was presented, other than the conclusory testimony of Mr. Conyers, that would either establish that in fact boys in detention respond to any significant degree to "role models" nor whether only males could effectively function as "role models" for these individuals. See *Marshall* v. *Kirkland*, *supra* 600 F.2d at 1300.

The Court's [sic] have generally found the conclusory testimony of interested officials of defendant employers to be, standing alone, insufficient to establish a valid defense for pursuing employment practices which would otherwise violate Title VII. See *United States* v. *Lee Way Motor Freight Inc.*, *supra*; 20 FEP cases at 1362; *Blake* v. *City of Los Angeles*, *supra* 595 F.2d at 1378.

It is not enough under Title VII to show some reasonable business purpose for the challenged practices. Rather, they must be shown by convincing evidence to be required by business necessity. See *Dothard* v. *Rawlinson*, *supra*; *Blake* v. *City of Los Angeles*, *supra*. That evidence has not been presented for this job.

Conyers admitted under cross examination that neither he nor anyone from the Personnel Board had ever conducted any formal studies to determine whether as a fact only males could safely and effectively perform the job of supervising boys in detention. Conyers further admitted under cross examination that on occasion women had been assigned to supervise boys in detention and that they had performed the duties of that job acceptably and with no adverse results.

On these fact [sic] we submit the Board has failed to establish by convincing evidence that sex is a bona fide occupational qualification requirement for the hiring and assignment of juvenile supervisors.

C. Assignment of Females To the Job of Policewoman

The record reflects that sometime in late 1969 or early 1970 the Personnel Board established the classification of policewoman. The first announcement for this position was issued on February 2, 1970 and it was a promotional announcement limited to employees of the City of Birmingham in the position of traffic citation officer (Px 8-Tab 3 (1969).[32] Prior to that time the job of traffic citation officer was a female only position (Px. 8 - tab 3 (1969).

As background to the issuance of this announcement the record reflects that two traffic citation officers of the City of Birmingham, Ms. Betty Jensen and Ms. Annalee Saunders, had sometime in 1969 complained to the mayor of Birmingham about their not being able to promote out of the traffic citation officer classification (Tr. Trans. 130-134). One of these women, Ms. Jensen, testified that since approximately 1960 she had made repeated requests to the Personnel Board to establish a promotion line from that classification. She was generally informed by the Board that no promotional examination was available because the Board had not established a position for "policewoman" (Tr. Trans. 128-129).

When the Board finally issued the promotional announcement for policewoman in February, 1970 both Jensen and Saunders passed the examination for that job and received their promotions.

Policewoman announcements issued by the Board subsequent to the February 2, 1970 announcement have generally been non-promotional, open competitive announcements (Px 8, Px 9). Siginificantly [sic] each of those announcements were limited to policewoman positions in the City of Birmingham (Px 8, Px 9). The Director of Personnel, Mr. Curtin, has testified by deposition that this was because only the City of Birmingham had expressed any desire to hire policewomen (Curtin Dep. Vol. III, May 24, 1979 p. 491)[.]

The policewoman classification continued in existence until approximately September or October of 1974 when it was merged with the police patrolman position (Curtin Dep. Vol IV, June 18, 1979, p. 561). After 1972 and up to the time the Board abolished the position of policewoman in the City of Birming-

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32 This announcement appears in Plaintiffs' exhibit 8 under the tab of announcements for the year 1969.

ham, the Board continued to include male only restrictions in its announcements for police patrolman and deputy sheriff (Px. 9). Thus women who applied for policewomen jobs in the City of Birmingham were because of their sex not eligible to compete for police patrolman positions either in the City of Birmingham or any of the other defendant municipalities. Nor were they eligible to compete for deputy sheriff positions in Jefferson County.

The job description established by the Personnel Board for policewoman generally provides for their assigment to "cases involving youthful offenders and females. . . and cases involving neglected or dependent children" (Px 13 p. 2). No mention is made in the job description of their being assigned any patrol car duties. Plaintiff's exhibit 13, p. 1 contains the job description for police patrolman which specifically includes patrol car work as part of the duties of that position.

Several women who are now police officers for the City of Birmingham testified that during the time they were employed as policewomen they were not assigned patrol duties (Tr. Trans. 135, 143, 144, 153-154, 163-164, 176-177).[33] Jensen and Saunders testified that after passing the examination for policewoman in 1970 they were sent to rookie school where they received the same classroom training and firearm instruction as police patrolmen (Tr. Trans 135, 153). They were not given the same physical contact and gymnastic instruction as men (Tr. Trans. 135, 153).

After completion of rookie school Jensen and Saunders were assigned to the Youth Aid division of the Birmingham Police Dept. (Tr. Trans. 135, 143-144, 153). All of the sworn male officers in the Youth Aid division had the rank of sergeant or above (Tr. Trans. 136-137, 144, Px 84). Jensen testified that she was assigned to Youth Aid in 1970 and continued to work in that division until 1975 (Tr. Trans. 135, 144). During this time she performed the same duties as the male sergeants in that division (Tr. Trans. 137). Saunders testified that she was assigned to Youth Aid for approximately 3 1/2 years where she worked with male sergeants investigating sex crimes (Tr. Trans. 154). She was then reassigned to the Crimes Against Persons

33 The record also appears to indicate that after the merger of the job of policewomen with police patrolman, women continued to be denied patrol duties on a regular basis (See Tr. Trans 163-165, 173-177).

division where she worked for approximately a year or longer investigating rape cases.

When Jensen and Saunders were promoted to the job of policewoman, they were required to meet the full five year time in grade requirement for promotion to sergeant and were not given credit towards this requirement for their years of service as traffic citation officers (Tr. Trans. 137, 156). In 1975 when Jensen first became eligible to take the sergeant's promotional examination, she began to recieve [sic] promotional potential ratings below 85 which disqualified her from eligibility to take the sergeant's examination (Tr. Trans. 138-140; Px 87). Jensen testified that the reason given by her department chief for her low promotional ratings was her lack of experience in a patrol car (Tr. Trans. 139-140).[34]

D. Discussion

The continuation by the Board of the sexually segregated job classifications of policewoman and police patrolman/deputy sheriff after the effective date of the 1972 amendments to Title VII was unlawful absent a showing that sex was a bona fide occupational qualification requirement for those jobs. *Dothard* v. *Rawlinson, supra*; *Blake* v. *City of Los Angeles, supra*; *United States* v. *City of Philadelphia*, ___ F.Supp. ___, 19 EPD ¶9011, 19 FEP Cases 849 (E.D. Pa. 1979).

The Board has presented no evidence to establish a BFQO [sic] defense for these positions. The fact that the Board subsequently merged the jobs of policewoman and police patrolman does not absolve or otherwise mitigate its liability for this unlawful employment practice. Indeed, it is simply added evidence that sex was never a legitimate basis for excluding women from police officer positions in the first place. *Blake* v. *City of Los Angeles, supra.*

The assignment of officers Jensen and Saunders to the Youth Aid division by the City of Birmingham was dictated in part if not exclusively by the job description for policewoman established by the Board. Since the only sworn personnel in that division had the rank of sergeant or above, it is not surprising that Jensen and Saunders were given the same or similar type of

34 Jensen also testified that in her belief the low ratings were not justified because she had obtained some field experience in the Youth Aid division, although she was not in a car all of the time and not in uniform (Tr. Trans. 140, 149-150).

duty assignments as these higher ranking and higher paid officers. This also constituted a violation of Title VII. See 42 U.S.C. 2000e-2(a), 2(h). *Peltier* v. *City of Fargo*, 533 F.2d 374 (8th Cir. 1976); *Gunther* v. *County of Washington*, 602 F.2d (9th Cir. 1979); *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert denied* 434 U.S. 720 (1978); *United States* v. *City of Milwaukee* 441 F. Supp. 1371 (E.D. Wis. 1972). See also *Wood* v. *Mills*, 528 F.2d 321 (4th Cir. 1975).

The low promotion potential ratings given to officer Jensen allegedly because of her failure to have obtained sufficient patrol experience was causally related to the Personnel Board's job description for policewoman. First, the job description itself did not include patrol car work among the duty assignments for policewomen. Secondly, the assignment of Jensen to the Youth Aid division where she was not exposed to patrol car work, at least on any regular basis, was an inevitable consequence of the restrictions on the job duties set by the Board for policewomen. Therfore [sic], the low promotion potential ratings given to officer Jensen, which were themselves based on a system devised by the Personnel Board, perpetuated the effects of past discrimination against her in the policewoman classification. As such they constituted an unlawful employment practice under Title VII. *United States* v. *Jacksonville Terminal Company*, 451 F.2d 418, 453-54 (5th Cir.1971), *cert. denied* 406 U.S. 906 (1971); *Rodriquez* v. *East Texas Motor Freight, Inc.*, 505 F.2d 40, 59 (5th Cir. 1974), *rev'd on other grounds* 431 U.S. 395 (1977); *United States* v. *City of San Diego*, 20 EPD ¶30,154 (S.D. Cal. 1979); *United States* v. *City of Buffalo*, 457 F. Supp. 612 (W.D. N.Y. 1978).

E. Height-Weight Requirements For Law Enforcement And Firefighter Positions

At trial the Board presented no evidence that the height-weight requirements previously followed by the Personnel Board for law enforcement positions (which includes the jobs of police patrolman, deputy sheriff and warden), and for firefighter positions were required by business necessity. Those height-weight requirements have been shown to have a disproportionate impact on women and thus they were unlawful employment requirements under Title VII. *Dothard* v. *Rawlinson, supra*.

In our Pre-trial Brief at pp. 47-49 we discuss in detail the evidence with respect to the Board's prior administration of its height-weight standards and the relevant case law in this area.

We see no need to expand upon that discussion other than to note that the evidence as set forth in our Pre-Trial Brief on this issues [sic] is supported by the record.[35]

F. Pre-Act Sex Restrictions In Job Announcements

The evidence reflects that between 1967 and 1972 the Board restricted on the basis of sex over 100 different classified service job titles (Px 8). These sex restrictions, the vast majority of which were male only restrictions, were included not only in the Personnel Board job announcements, but were also broadcast to the community in its radio, television and newspaper advertisements and in its recruitment brochures given out at local high schools and colleges (See Px. 14, Dx 335).

Evidence of pre-Act conduct is of course admissible in Title VII cases where it bears upon post-Act hiring and other employment decisions. *Teamsters* v. *United States*, *supra*. 431 U.S. at 324; *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977).

As the Supreme Court stated in *Hazelwood*:

> Proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decision-making process had undergone little change 433 U.S. at 309 fn. 15

Plaintiffs exhibit 57 sets forth the number of women who from 1972 through 1976 were certified and hired in 49 of the jobs which prior to 1972 were restricted to males only by the Personnel Board.[36] That exhibit reflects a total of 1375 hires in those positions of whom only 18 (1.3%) were women and a total

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35 One minor clarification of the facts set out in our Pre-Trial Brief was made at trial by the Board's Chief of Classification and Pay, Mr. Fields. He testified that the eligibles list for police officers and deputy sheriffs which was based on a January 16, 1976 announcement that contained minimum height and weight restrictions expired sometime in early 1978. On his deposition he had testified that that eligibles list had continued in effect up to the time of his deposition (see Fields Dep. Vol. II June 18, 1979, pp. 80-81).

36 Of the other jobs for which there were pre-Act sex restrictions, they involved for the most part either female only positions, obsolete job titles, or jobs with few, if any, post-act hires (See Px 57 and Px 82)

of 4547 certifications to those jobs of whom only 89 (2.0%) were women.[37]

As we point out in our Pre-Trial Brief at pp. 43-44 and as reflected by the announcements contained in plaintiffs' exhibit 8, many of these jobs required little if any prior skill or experience, or if they did, they involved skills or experience which could be readily acquired. See *Hazelwood School District* v. *United States*, *supra*, 433 U.S. at 308 fn. 13 (1977).

At trial the Board presented no evidence that after the effective date of the 1972 amendments to Title VII it made any positive efforts to announce to the community that applicants need not be of a particular sex for these jobs.

Moreover, the Board's own exhibit on recruitment (Dx 335) reflects that after 1972 no positive efforts were ever made to recruit women for these traditionally male jobs.[38] The only testimony offered at trial concerning the Board's efforts to recruit women was the testimony of the Chief Examiner, Ms. Miriam Hall, to the effect that since she became Chief Examiner, which was in 1977, the Board has included some women's organizations on its job announcement mailing list.

On the other hand there is evidence before this Court that since at least 1975 another major employer in the community, the United States Steel Corporation, has successfully recruited and hired women in substantial numbers for jobs such as laborer, crane operator, truck driver, forklift operator, and inspector (Pxs 126, 127 and trial testimony of Mr. Truman Malone).

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37 The Board did not begin to keep applicant flow data for women until 1974. At trial the Board introduced several exhibits purporting to reflect applicant flow information for blacks and women from 1974 through 1977 (Dx 323-327). That data does not appear to us to contain complete applicant flow information for all of the classified service jobs. However, even if one compares the applicant flow information in the Board's exhibits where such information exists for the jobs listed on Plaintiffs exhibit 57, that comparison continues to reflect a paucity of women applicants. We have attached to this Brief as Appendix C our analysis of that data.

38 Indeed, that exhibit appears to reflect that even after the Board dropped the sex restrictions from the announcements for some of the jobs listed on plaintiffs exhibit 57, it continued as recently as early 1973 to include such sex restrictions in its recruitment brochures (See Dx 335 and recruitment materials for Jefferson County Board of Education Career Opportunity Program - April 12-13, 1973[).]

The Personnel Board, however, has since 1972 had few, if any, women applicants for similar positions which had traditionally been designated by the Board as male only jobs. See Plaintiffs exhibit 57.

In sum, given the evidence of, (1) intentional pre-Act discrimination against women in these jobs, (2) the virtual absence of female applicants, certifications and new hires in most if not all of these positions after the 1972 amendments to Title VII, and (3) the absence of any efforts by the Board after 1972 to engage in positive recruitment efforts towards women; that evidence establishes a *prima facie* case of hiring discrimination against women in these jobs. *Hazelwood* v. *United States*, *supra*.

VI. HIGH SCHOOL EDUCATION REQUIREMENT

Based on 1970 Census data as updated the plaintiffs' [sic] have shown that the requirement of a high school diploma or GED equivalent for the jobs for which this requirement is challenged[39] has had an adverse impact on blacks in the Jefferson County area. (See Px. 80).

At trial the question arose as to whether the 1970 Census data includes persons who obtained GED's . It appears that in collecting the data for the 1970 Census no systematic effort was made to include information as to GED attainment.

In response to that question, Plaintiffs' [sic] offered exhibit 145 which is a Census Bureau survey current as of March 1977 which contains data an [sic] educational attainment and which includes persons with GED's as part of the total population completing 4 years of high school.

The question then arose as to whether that exhibit in fact included persons with GED's in the population totals of persons completing four years of high school. Attached to this Brief as Appendix D is an excerpt from the Census Bureau's interviewers reference manual dated December, 1971 which specifically instructs interviewers to denote persons who pass a high school equivalency test (GED) as having completed high school. These instructions have continued in effect since that date. See Appendix C.

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39 Those jobs are: animal keeper/zookeeper, bailiff, engineering aide, firefighter, groundman, police radio dispatcher/radio dispatcher, and sewage plant operator.

Plaintiffs' exhibit 146 is a summary exhibit which is based on the educational attainment figures (which includes GED's) as set forth in exhibit 145. It continues to show a significant disparity between the percentage of blacks and whites completing four years of high school.[40]

In an effort to demonstrate the content validity of its high school education requirements analysts of the Personnel Board without the assistance of outside experts developed a questionnaire. That questionnaire was given to selected incumbents in the jobs for which the high school education requirement was being challenged, and it asked that they respond to the following question:

> (1) Given the duties and responsibilities placed upon the [job title] in performance of their job and taking into account all the situations encountered in performing the job duties, is reasonable [sic] to require that a [job title] have a high school diploma or its equivalence?

The incumbents were then given a rating form which asked that they indicate whether in terms of their job and the question asked a high school education or equivalent was: (1) unrelated, (2) fair, (3) good or (4) superior. See e.g. Dx 416.

These ratings were then tabulated by computer and an analysis of the ratings was then made which included the mean and median ratings for each job.

The procedures followed by the Personnel Board to establish the validity of the high school education requirement constituted in substance nothing more than a sample opinion poll of job incumbents.

No job analysis was performed to determine whether there are knowledges, skills or abilities (KSA's) required at entry in each of the jobs which KSA's could only and invariably be acquired by an individual who successfully completed four years of high school or who had obtained a GED. Failure to conduct an adequate job analysis meeting professional standards is itself fatal to a claim of content validity. *Vulcan Society of New York*

40 The 1977 census figures are broken down only by geographical region (North, South, etc) and by the fifteen largest States in the Union. Plaintiffs' exhibit 146 shows that there is a substantial disparity between the percentage of whites and blacks completing high school both in the South as a whole and in each of the Southern States (Florida, Georgia, North Carolina, Texas, and Virginia) which comprise the 15 largest States in the Union.

City v. *Civil Service Commission*, 490 F.2d 387, 394 n. 8 (2d Cir. 1973); *Kirkland* v. *New York State Dept. of Correctional Service*, 374 F. Supp. 1361, 1371-72 (S.D.N.Y. 1974), *aff'd* 520 F. 420, 475 (2nd Cir. 1975), *cert denied* 429 U.S. 832 (1976), See *Albemarle Paper Co.* v. *Moody*, 401 U.S. 424 (1971); *United States* v. *City of Montgomery*, ___ F. Supp. ___ (M.D. Ala. 1979) 19 EPD ¶9239. See also APA Standards E 12.4; Uniform Guidelines on Employees Selection Procedures, §14c(2), Division 14 Principles p. 10.

It should also be noted that the Board's testing expert, Dr. Menne, testified that in his opinion it is extremely difficult to establish the content validity of a high school education requirement. Dr. Menne, we further note, was not asked by the Board to either review the high school validation studies or to give his opinion as to their evidence of validity.

In sum, we submit the Board has failed to establish that a high school education requirement is a content valid selection device for the jobs in question.

CONCLUSION

Based upon the foregoing we submit that the Personnel Board has engaged in a pattern and practice of discrimination against blacks and women in each of the areas set forth above.

Respectfully submitted,

/s/ Richard J. Ritter
/s/ S. Theodore Merritt
/s/ Steven Rosenbaum

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[Certificate of service, dated November 9, 1979, and appendices omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-12-S

ORDER

The Court has before it for provisional approval two Consent Decrees in the above-captioned consolidated actions. They are: (1) a Consent Decree between the plaintiffs in the above styled actions, and the defendants Jefferson County Personnel Board, its Director and the members of the Personnel Board (Jefferson County Personnel Board); and (2) a Consent Decree between these same plaintiffs and the defendants City of Birmingham and the Mayor of the City of Birmingham (City of Birmingham). The Court has not been presented to date with any proposed Consent Decrees between the plaintiffs and the remaining defendants in these actions.

The Consent Decrees are intended to resolve all of the plaintiffs' claims of employment discrimination based on race and sex against the Jefferson County Personnel Board and City of Birmingham as raised by the plaintiffs' complaints. Having reviewed the Consent Decrees, the plaintiffs' complaints, and the trial record and other pleadings in these cases, the Court hereby ORDERS that:

1. The Consent Decrees appear to the Court to be fair, reasonable and lawful settlements of the plaintiffs' claims against the defendants who are signatories to the Decrees. Accordingly, the Court provisionally approves the Consent Decrees subject to further hearings. The Court will reserve final approval of the Consent Decrees until it has heard any objections which may be filed and presented at a fairness hearing in accordance with the procedures explained below.

2. The form and substance of the notice of this Court's Order provisionally approving the Consent Decrees and scheduling the fairness hearing is hereby approved and is attached to this Order.

3. Within ten (10) days after entry of this Order the notice attached hereto will be issued by publication in the Sunday edition of the Birmingham News for two consecutive weeks, and in the Birmingham Times on one weekday. These notices shall be directed to all interested persons informing them of the general provisions of the Consent Decrees, of their right to review copies of the Decrees on file with the Clerk of the Court, and of their right to file objections to the Consent Decrees. Within this same ten (10) day period, copies of the attached notice will be sent by regular mail to the last known addresses of the individuals within the subclasses identified in Appendix B to the Consent Decree with the Jefferson County Personnel Board and in Appendix C to the Consent Decree with the City of Birmingham.

All objections to the Consent Decrees must be filed in writing with the Clerk of the Court by July 14, 1981. The Clerk shall forward copies of any such objections to counsel for the parties to the Consent Decrees as they are filed. A fairness

hearing will be held on August 3, 1981 at 9:00 o'clock a.m. in Courtroom 2.

It is so ORDERED this 8th day of June, 1981.

/s/ Sam C. Pointer, Jr.
UNITED STATES DISTRICT JUDGE

Approved as to Form

For Plaintiff United States

/s/ Richard J. Ritter

For the Plaintiffs in *Martin, et al.* v. *City of Birmingham, et al.*

/s/ Susan Williams Reeves

For the Plaintiffs in *Ensley Branch of the N.A.A.C.P., et al.* v. *Seibels, et al.*

/s/ Oscar W. Adams, III

For the Defendant Personnel Board of Jefferson County

/s/ David P. Whiteside, Jr.

For the Defendant City of Birmingham

/s/ James P. Alexander

[Attachment omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NOS. CV 75-P-0666-S CV 74-Z-17-S CV 74-Z-12-S (Consolidated Cases)

AFFIDAVIT OF PUBLICATION OF NOTICE OF CONSENT DECREE

STATE OF ALABAMA
JEFFERSON COUNTY

I, James K. Baker, being duly sworn according to law, deposes [sic] and says [sic] that:

1. I am employed by the City of Birmingham as its City Attorney.

2. Pursuant to and in compliance with the Order of this Court entered herein on June 8, 1981, I did cause to have published the "Notice of Proposed Settlement Agreements and Conditional Class Certification," which Notice was designated as Appendix F-1 in the within Consent Decrees as provisionally approved by the Court in newspapers and on the dates for each as follows:

a. The Birmingham Times, edition of June 11, 1981.

b. The Birmingham News, Sunday editions of June 14 [and] June 21, 1981.

3. True and correct copies of said Notices as published are attached to and made part of this Affidavit.

/s/ James K. Baker
James K. Baker

Sworn to and subscribed before me, this 25th day of June, 1981.

/s/ Notary Public
Notary Public

[Certificate of Service, dated June 25, 1981, and attachments, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-12-S

MOTION FOR LEAVE TO APPEAR AND FILE BRIEF AMICI CURIAE

Comes now the Birmingham Firefighters Association 117 by and through its President, Billy Gray, and Billy Gray, individually, who show unto this Honorable Court as follows:

1. Birmingham Firefighters Association 117 is a labor organization of the firefighters of the City of Birmingham. For many years it has represented City firefighters in negotiations of items of import to City firefighters. The Firefighters Association is duly authorized to represent the views of the majority of City firefighters.

2. The proposed Consent Decrees presently pending before this Court in the above-referenced actions will have a severe and material impact upon the presently employed firefighters of the City of Birmingham and the members of the Firefighters Association regarding their potential for future advancement and promotion, the qualifications of those persons who are placed in positions of authority over the presently-employed firefighters, and the general welfare and safety of the presently-employed firefighters when fighting fires or otherwise engaging in emergency rescue activities.

3. Billy Gray is a lieutenant in the Birmingham Fire Department. He will be materially affected by the proposed Consent Decrees for the reasons specified in paragraph 2, above, and in his potential for advancement due to imposition of quotas for certain positions in the Fire Department and the elimination of time in grade requirements by the proposed Decrees.

WHEREFORE, PREMISES CONSIDERED, Birmingham Firefighters Association 117 and Billy Gray, pursuant to this Court's inherent jurisdiction over all matters pertaining to the above-referenced cases, and the Court's desire that all interested parties to the proposed Decrees be given an opportunity to be heard before the Court, respectfully pray for leave to file the following brief amici curiae in opposition to the proposed Decrees.

/s/ W. W. Conwell
W. W. CONWELL

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.
Attorneys for Birmingham
Firefighters Association 117
and Billy Gray

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[Certificate of Service, dated July 14, 1981, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-12-S

PETITION OF BIRMINGHAM FIREFIGHTERS ASSOCIATION 117 AND BILLY GRAY TO APPEAR AS INTERESTED PERSONS

Pursuant to this Court's Order dated June 8, 1981, Birmingham Firefighters Association 117 and Billy Gray show unto this Honorable Court as follows:

1. Birmingham Firefighters Association 117 is a labor organization of the firefighters of the City of Birmingham. For many years it has represented City firefighters in negotiations of items of import to City firefighters. The Firefighters Association is duly authorized to represent the views of the majority of City firefighters.

2. The proposed Consent Decrees presently pending before this Court in the above-referenced actions will have a severe and material impact upon the presently employed firefighters of the City of Birmingham and the members of the Firefighters Association regarding their potential for future advancement and promotion, the qualifications of those persons who are placed in positions of authority over the presently-employed firefighters, and the general welfare and safety of the presently-employed firefighters when fighting fires or otherwise engaging in emergency rescue activities.

3. Billy Gray is a lieutenant in the Birmingham Fire Department. He will be materially affected by the proposed Consent Decrees for the reasons specified in paragraph 2, above, and in his potential for advancement due to imposition of quotas for certain positions in the Fire Department and the elimination of time in grade requirements by the proposed Decrees.

WHEREFORE, PREMISES CONSIDERED, Birmingham Firefighters Association 117 and Billy Gray respectfully request the Court to accept the following brief as objections to the proposed Consent Decrees from interested persons within the meaning of the Court's June 8, 1981 Order.

/s/ W. W. Conwell
W. W. CONWELL

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.
Attorneys for Birmingham
Firefighters Association 117
and Billy Gray

OF COUNSEL:

FOSTER & CONWELL
2015 Second Avenue North
Birmingham, Alabama 35203
(205) 322-6617

REQUEST FOR ORAL ARGUMENT

Birmingham Firefighters Association 117 and Billy Gray respectfully request such time as the Court will allow to present oral argument at the Fairness Hearing to be held August 3, 1981.

/s/ R. P. Fitzpatrick, Jr.
OF COUNSEL

* * *

SUMMARY OF ARGUMENTS AND ISSUES PRESENTED

The Birmingham Firefighters Association 117 and Billy Gray appreciate the opportunity to present to this Honorable Court, as amicus curiae and as representatives of interested parties, the following views and argument concerning the proposed Consent Decrees which are before the Court. Although the rank-and-file firefighter, as well as the other employees of the City of Birmingham, have not been made a party to this action, the proposed Decrees will have a materially adverse impact upon each individual firefighter and city employee. In addition, the Firefighters Association respectfully suggests to the Court that the implementation of the proposed Decrees will have a general effect of lowering the efficiency, effectiveness and overall quality of the City Fire Department — such loss being ultimately borne by the public.

This brief will discuss the following points:

1. The trial court is under an obligation to consider the legality of the provisions of the relief granted in the proposed Decrees and to avoid granting judicial approval of any remedy which provides more relief than an aggrieved party would have been entitled to had the matter been litigated to a conclusion before the judge.

2. The Court may not approve a consent settlement providing for affirmative relief for blacks and females which will adversely discriminate against whites and males without a judicial finding of actual discrimination.

3. Without findings of actual discrimination, the Court may not approve the proposed remedies which grant relief to blacks and females in general, to the detriment of whites and males, rather than simply providing necessary relief to the actual victims of discrimination.

4. The proposed Decrees do not contain a finding of any discrimination on the basis of sex.

5. The provisions of the proposed Decrees would place blacks in the certified classes in a position to gain more seniority through the affirmative relief granted than they would presently have had they been certifed [sic] at the time they took the Personnel Board's examinations.

6. The removal of educational standards and time-in-grade requirements will adversely affect the overall quality and efficiency of the Fire Department which conflicts with the constitutional duty of government to provide for the general welfare of its citizens.

ARGUMENT

The Firefighters Association and Billy Gray will not burden the Court with an unduly protracted argument. We simply wish to point out to the Court, among other things, that:

(1) there is ample precedent to refuse approval of Consent Decrees similar to those in the instant case;

(2) there has been no finding of discrimination which warrants the type relief granted in the Decrees; and,

(3) the present City firefighters and other City employees who have worked hard to gain seniority and experience will be caused to suffer the real burden of the relief granted — all to the enrichment of those who will receive preferred status who were never even the actual victims of the alleged discriminations.

Paragraph 3 of the City Decree and paragraph 2 of the Personnel Board Decree provide:

> Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree *shall not be deemed dis-*

> *criminatory* with the meaning of paragraph 1 above or the provisions of 42 U.S.C. 2000 e-2(h), (j), ... (Emphasis added.)

We submit that the sweeping relief granted by the Decrees (far in excess of that provided by this Court in its Order of January 10, 1977) have the effect of discriminating in violation of the cited statute. In effect, the parties to the Consent Decrees petition this Court to judicially approve illegal discriminations.

In *Myers* v. *Gilman Paper Co.*, 544 F.2d 837 (5th Cir. 1977), the appellate court reversed in part the consent decrees which were entered into between plaintiffs and the defendant employer to the exclusion of the defendant labor unions. The court found that the employer could not enter into a decree which violated the provisions of the collective bargaining agreement with the defendant unions. We are, of course, sad to admit that we have not achieved the right to collectively bargain with the City of Birmingham; however, we find certain statements in the *Myers* decision controlling in the instant case.

IV. Challenges to the Consent Decree.

The unions all vigorously object to the district court's approval of the settlement between the company and plaintiffs. They insist that the court had no power to substitute a Title VII remedy negotiated by a small group of employees and the company for the August, 1972, collectively bargained Title VII remedy, without any finding that the latter is unsatisfactory under Title VII. We find ourselves in substantial agreement with the union's contention.

Before a court can grant any relief in a Title VII suit, it must find that the defendants engaged in the unlawful employment practice alleged in the complaint. 42 U.S.C. § 2000 e 5(g); *Cf. United States* v. *T.I.M.E., D.C., Inc.*, *supra* at 319.

* * *

. . . There is an important reason for distinguishing between past and present discrimination, for *different remedies are involved*. Back pay is the remedy for past wrongs; injunctive and other equitable relief is the remedy

for continuing wrongs. *Pettway* v. *American Cast Iron Pipe Company, supra* at 253.

* * *

. . . Further, in its order approving the settlement, the court made no finding with respect to the adequacy or inadequacy of the supplemental labor agreements. The court simply stated that "(a)n examination of the proposed Consent Decree shows that it follows generally settlements and decrees in other cases involving similar problems in the same industry. *See, e.g. United Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970." *That seminal case, however, did not authorize wholesale revisions of a seniority system absent a finding of present perpetuation*. The district court in that case had specifically found that the seniority system "presently discriminates against Negro employees." 416 F.2d at 985.

* * *

In speaking to the broader issue of the approach courts should take in exercising their remedial powers on neutral practices, the court in *Stevenson* said:

> (a) "neutral" seniority system should not be enjoined totally, but should be modified only as it applies to those employees who were previously subjected to discrimination, only to the extent necessary to remove the elements perpetuating that discrimination, and only for a limited period of time. 516 F.2d at 118.
>
> See also *Watkins* v. *Scott Paper Company, supra* at 1174. *Watkins* and *Stevenson* thus make it clear that before a district court can modify seniority provisions *there must be a challenge by the plaintiffs to the present provisions* and *a finding by the court that the present provisions still perpetuate discriminatory effects of prior action.*

544 F.2d 837, at 854, 855 (emphasis added).

The Firefighters Association earnestly contends that there is no finding in the proposed Decrees that there is any *ongoing present discrimination* being conducted by the defendants warranting the relief provided. The Personnel Board Decree provides:

> The Personnel Board *denies* it has engaged in any pattern or practice of discrimination or other types of discrimination on the basis of race or sex in carrying out its employee selection functions. . . . The plaintiffs and the defendant Jefferson County Personnel Board wish to avoid the expense and delay of further litigation and to insure that any *alleged* disadvantages to blacks and women that *may* have resulted from any *alleged past* discrimination against them . . . are remedied . . . .
>
> * * *
>
> *This Decree shall not constitute an adjudication or admission by the Personnel Board of any violation of law or findings on the merits of these cases.*

Personnel Board Decree, pp. 2, 3 (emphasis added). The City Decree similarly states:

> This Decree shall not constitute an adjudication or admission by the City of Birmingham or others signatory to this Decree of any violation of law, executive order or regulations.

City Decree, p. 2. The City Decree, in fact, acknowledges how the City has undertaken a vigorous affirmative action program:

> The plaintiffs recognize the adoption by the City of Birmingham of Sections 2-4-51 through 2-4-56 of the Birmingham City Code ("the fair hiring ordinance"), the annual preparation and implementation by each department of the City of Birmingham of affirmative action plans in accordance with the fair hiring ordinance, and the issuance by the Mayor of the City of Birmingham of Administrative Directive AA-1 and Executive Order 17-77, as evidence of good faith efforts by the City of Birmingham to take meaningful affirmative action to increase

minority and female participation throughout the City's work force.

It is difficult to imagine how plaintiffs could contend that the City is continuing a present pattern of discrimination when they recognize "good faith efforts by the City of Birmingham to take meaningful affirmative action" at the same time.

Myers was quoted from and cited as authority by the U.S. District Court for the Eastern District of Virginia in its refusal to approve a proposed consent decree. *Carson* v. *American Brands, Inc.*, 446 F.Supp. 780 (E.D. Va. 1977). The District Judge "expressed concern that certain provisions of the Decree would affect parties other than those before the Court." As in the proposed Decrees before the Court in the instant case, the proposed Decree in *Carson* provided that the defendants denied violation of any law, regulation or order and, conversely, the plaintiffs do not by consent admit the legality of defendant's hiring practices. In finding a constitutional duty to scrutinize the legality of the proposed Decree, the Court stated:

> Thus, the Fifth Amendment may well protect citizens against arbitrary and capricious federal action in the form of a federal court Consent Decree that would place a federal stamp of approval, with the full force and effect of contempt proceedings, to what would otherwise be a mere agreement between private parties. *See Shelley* v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed 1161 (1947). In sum, we opine that the mandates of the United States Constitution as well as the statutes invoked by plaintiffs require us to insure that this Court plays no role in perpetuating, promulgating or acquiescing in improper discrimination on the basis of race.

446 F.Supp., p. 84. Examining 42 U.S.C. § 2000e-2(a) and (j), the Court opined:

> Title VII plainly and distinctly prohibits racial discrimination in any and all aspects of employment practices including but not limited to *recruitment, promotions, seniority* and benefits. The language clearly prohibits discrimination against whites as well as blacks on account of race and clearly makes no exception for alleged benign

> motives such as rectifying the effects of past discrimination. Indeed, Subsection (j) explicitly states that preferential treatment is not required to rectify racial imbalance. To be sure, Title VII does not exclude use of extraordinary measures *to make those individuals who actually suffer from the results of past or present discrimination whole, but such action is more aptly characterized as equitable, not preferential, treatment. And even in this context, the courts have been careful to minimize whatever adverse effects may result with respect to innocent third parties.*

446 F.Supp., pp. 784, 785 (emphasis added). The District Judge examined at depth the legislative history of Title VII and a number of cases before making a conclusion concerning the propriety of the relief provided by the proposed decree:

> Senator Williams' understanding as above expressed in advocating passage of Title VII was shared by Senators Clark and Case:
>
> > There is no requirement that an employer maintain a racial balance in his work force. *On the contrary, any deliberate attempt to maintain a racial balance, whatever the imbalance may be, would involve a violation of Title VII* because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. (110 Cong.Rec. 7213, April 8, 1964)
>
> Further, at the behest of the bill's sponsors, the Department of Justice submitted a memorandum stating:
>
> > *Finally, it has been asserted that Title VII would impose a requirement of "racial balance." This is incorrect.* There is no provision, either in Title VII or in any other part of this bill that requires or authorizes any federal agency or federal court to *require preferential treatment for any individual group for the purpose of achieving racial balance.*
> >
> > No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites,

Jews to gentiles, Italians to English, or women to men. (110 Cong.Rec. 7207, April 8, 1964.)

* * *

The Supreme Court, in the more recent decision of *McDonald* v. *Santa Fe Transportation Co.*, 423 U.S. 923, 96 S.Ct. 264, 46 L.Ed.2d 248 (1976), made clear though not in the factual context of an affirmative action program, that Title VII's protection from racial discrimination applied to whites as well as blacks. Close in time to *McDonald*, the Court in *Franks* v. *Bowman Transportation Co.*, 423 U.S. 814, 96 S.Ct. 25, 46 L.Ed.2d 32 (1976) *did award constructive seniority and back pay to remedy racial discrimination against blacks and this remedy may have adversely affected seniority rights of innocent white employees*. However, this relief was *unequivocally restricted to individual, identifiable, persons who were otherwise qualified for the positions they sought but had been denied on account of race.*

Similarly, the Fourth Circuit has consistently *limited remedial relief under Title VII to actual persons who were victims of unlawful discrimination*, thereby *minimizing disruption of the working lives and expectations of other innocent employees.*

* * *

(8) Title VII, by its own terms, does not *require* preferential treatment to rectify racial imbalance. This language may be interpreted to mean that, although permissible, it is not mandated. *Patterson* (*Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976) *states in no uncertain terms that preferential treatment is banned absent proof of discrimination. As in Russell the Court in Patterson carefully tailored the relief to cover only actual victims of discrimination. See also, United Sates* [sic] v. *Chesapeake & Ohio Railway Co.*, 471 F.2d 582 (4th Cir. 1972).

446 F.Supp. pp. 785-787 (emphasis added).

Examining the proposed Decrees in the instant case, Firefighters and Gray earnestly submit that the relief granted

provides far more than a rectification of any wrongs done to the alleged actual victims of discrimination, but in fact, grants preferred status to all blacks and females. As detailed earlier, the proposed Decrees contain no finding or admission of race or sex discrimination. In fact, this Court's January 10, 1977 Memorandum of Opinion noted that "any attack on the 10-C and 20-B tests based on sex was . . . dropped for lack of evidence." Page 2, note 5. Despite the lack of any findings of fact that discriminations continue against the plaintiff class, the proposed Consent Decrees provide for such sweeping relief as: imposition of a quota system for the hiring of blacks and females at the entry level and on a promotional basis (prefers blacks and females for promotion); judicially mandated affirmative action programs within City agencies; judicially mandated recruitment programs which favor blacks and females to the exclusion of recruitment programs geared toward recruiting qualified white males; elimination of time in grade requirements for promotion (discriminates against present employees who have served their required time in grade and who now must compete on an equal basis with new employes who have not served the required time). There have been no findings that the foregoing relief is necessary to correct *present* acts of discrimination. We submit that the individual relief granted adequately provides for the individual, *actual* alleged victims of discrimination, and the general equitable relief granted unnecessarily prefers blacks and females, thereby constituting a violation of §2000e-2(j).

The Firefighters Association and Gray also suggest that the proposed Consent Decrees may conflict with the negotiated "agreements" between present City employees and the City in that the system of promotions and standards by which fellow employees are hired all constitute a part of the "agreement" which labor and employer have abided by for many years. See *Myers, supra.*

The proposed Decrees will grant seniority to members of the certified classes back to the date they claim they should have been certified. In effect, such a ruling would grant to the plaintiffs seniority over those employees (white and black) who passed the test which plaintiffs failed but did not enter the service until some later date because they were lower down on the

list of those who passed. Such a preference for those blacks who failed constitutes a violation of 2000e-2(j).

Finally, the Firefighters Association members are concerned about the dropping of educational, criminal record and physical strength standards for their potential future co-employees and supervisory personnel. A firefighter's job is daily becoming more complex and technologically oriented as new firefighting equipment enters the marketplace and Birmingham moves into the mainstream of American society as a progressive Sun-Belt city. The firefighter is no longer a person who wears red suspenders, rescues cats from trees, and simply aims a hose at the flames. Rather, the firefighter is the first medical person on the scene of a multi-vehicle accident or location of heart attack, uses toxic chemicals and other sophisticated equipment, battles fires in high-rise buildings (e.g., the recent hotel fires across the nation), and is the only person willing to go into a smoke-filled building to rescue persons overcome by smoke inhalation. The firefighters of Birmingham do not wish to perpetuate any of the injustice of the past based on race or sex — they welcome equal opportunity for all; however, the firefighters of Birmingham are concerned about their ability to fulfill their mandate to provide for the safety of the public when their fellow firefighter may be untrainable due to the lack of educational standards at the entry level, and their supervisor lacks necessary on-the-job training due to the lack of time in grade requirements.

CONCLUSION

The Firefighters Association and Gray oppose the proposed Consent Decrees as persons who will be adversely affected and illegally discriminated against under the terms of the Decrees. The Decrees give preference to blacks and females in general to the deference of white males. Without necessary findings of discrimination, the law will not permit such a far-reaching remedy of quotas, etc. The proper remedy is back pay for the actual victims of discrimination. The present employees of the City should not be made to pay the price for the alleged discriminations conducted by the City in the past. The City is due to make restitution, at its expense, not that of its employees.

If the Court refused to sign the proposed Decrees, the aggrieved parties will not suffer any great loss as they have an immediate right to appeal. *Carson* v. *American Brands, Inc.*, ___ U.S. ___, 67 L.Ed.2d 59 (1981). What recourse do the present employees of the City have if the Decrees are approved?

Respectfully submitted,

/s/ W. W. Conwell
W. W. CONWELL

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.
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[Certificate of Service, dated July 14, 1981, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
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OBJECTIONS TO THE PROPOSED CONSENT DECREES

Come now Johnny Morris, Jessie Sprayberry, B. R. Stephens, J.R. Davis, John Dipiazza, Juanita Eaton and Barbara Buckland by and through their attorneys of record and files this their objections to the proposed Consent Decree in the above-reference [sic] cases. The undersigned respectfully object to the proposed Consent Decrees on the following basis separately and severally:

1. The proposed Consent Decrees will have an adverse impact on the hiring and promotion of whites who have a vested interest in the merit system.

2. There is no relationship between the approximate percentages of blacks and women in the civilian labor force of Jefferson County and the percentages of blacks and women who are actually qualified to hold merit system positions in the Birmingham Police Department.

3. The goals for blacks and women for hiring and promotion to the position of Police Officer and Police Sergeant are not representative of the percentages of qualified blacks and women of the civilian labor force in Jefferson County.

4. The proposed Consent Decree of the City of Birmingham discriminates between women and blacks in that it provides that at least two blacks will be promoted to the next four (4) Lieutenant vacancies in the Police Department and at least one (1) black shall be promoted to the next two (2) Captain vacancies in the Police Department. The Decree further provides that the City shall seek to achieve the interim goals promoting blacks to vacancies in lieutenant and captain positions in the Police Department at twice the black percentage representation in the job classifications from which promotional candidates are traditionally selected for these jobs.

There is no such preference provided for female personnel who will be promoted to positions above the rank of sergeant on approximate equivalent percentages of their representation in the job classifications from which promotional candidates are traditionally selected.

5. The proposed Consent Decrees do not recognize the vested interest of employees who have been rolled back to a lower rank or classification and have permanent status on the lay-off lists.

6. The certification of blacks and females who are not incumbent employees of the City of Birmingham would be discriminatory toward white males who are eligible for promotion under the Personnel Board Rules and Regulations.

7. Any valid height and weight requirements should be equally applied to applicants of any race or sex.

8. Provisions relating to background investigations and dismissal from the Police Training Academy should be

equally applied to applicants of any race or sex. Certain provisions of Paragraphs 49 and 50 of the proposed Consent Decree of the City of Birmingham violate the right of privacy.

9. The provisions of Paragraph 53 of the proposed Concent [sic] Decrees of the City of Birmingham violate the right of privacy.

10. The provisions of the Decrees are detrimental to the merit system and in some instances would be contrary to the provisions of 36-21-46 of the Code of Alabama of 1975 which relates to minimum standards for applicants and appointees for employment as law enforcement officers.

Respectfully submitted,

LAW OFFICES OF
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[Certificate of Service, dated July 14, 1981, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
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UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
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RESPONSE OF UNITED STATES TO OBJECTIONS TO THE PROPOSED CONSENT DECREE

Introduction

The Court's Order of June 8, 1981 provisionally approving the Consent Decrees provided interested persons the opportunity to file objections to the decrees. No party to the litigation has filed an objection. Nor has any member of the class of plaintiffs in the private suits filed an objection. Two organizations and a group of individuals have filed such objections. None of the objectors asserts a deprivation of any rights under a collective bargaining agreement. In this memorandum plaintiff United States responds to the objections raised, and supports the entry of the Consent Decrees.

The United States filed its complaint in these consolidated actions in 1975 after the Attorney General found reasonable cause to believe that defendant Jefferson County Personnel Board, defendant City of Birmingham and other defendant jurisdictions in Jefferson County were engaged in a pattern or practice of employment discrimination against blacks and women. The complaint alleged that defendants discriminated on the basis of race and sex with respect to recruitment, hiring, assignment, promotion, discipline, and other terms and conditions of employment.

To date this case has resulted in two trials. The first trial concerned the Personnel Board testing practices for entry level police, deputy sheriff and fire positions and culminated in this Court's Decision and Order of January 10, 1977, 14 FEP Cases 670, *aff'd in part, rev'd in part and remanded*, 616 F.2d 812 (5th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3443 (Dec. 15, 1980). The second trial took place in 1979, and a complete record was developed concerning testing practices of the Personnel Board for certain other positions, promotional practices, and other selection and employment practices alleged to be discriminatory against blacks and women. The proposed decrees would obviate the need for decision on the second trial. They also would eliminate the need for any further trial proceedings with respect to the City of Birmingham and the Personnel Board.

The parties have resolved all issues raised in the complaint with respect to defendant Personnel Board and defendant City of Birmingham, and have tendered to the Court two Consent Decrees which embody that settlement. Plaintiff United States believes that the terms of the decrees represent lawful and appropriate relief to remedy the effects of any past or continuing discriminatory practices.

Summary of Argument

A district court should enter a consent decree if the provisions are lawful, reasonable and equitable. *United States* v. *City of Alexandria*, 614 F.2d 1385 (5th Cir. 1980), *United States* v. *Allegheny-Ludlum Industries*, 517 F.2d 836 (5th Cir. 1975), *cert. denied sub nom., N.O.W.* v. *United States*, 425 U.S. 944. Consent decrees submitted jointly by the parties should be entered despite objections by third persons if the court determines that a decree's

provisions are consistent with the allegations of the complaint, the substantive law, and public policy. See, *EEOC* v. *American Tel. & Tel. Co.*, 556 F.2d 167 (3rd Cir. 1977), *cert. denied*, 438 U.S. 915, *S.E.C.* v. *Dennett*, 429 F.2d 1303 (10th Cir. 1970).

Here the proposed decrees should be entered, not only because of the general policy in favor of voluntary resolution of cases, but because "[i]n a Title VII case, as here, the policy favoring settlement is even stronger in view of the emphasis placed upon voluntary conciliation by the Act itself." *Cotton* v. *Hinton*, 559 F.2d 1327, 1331 (5th Cir. 1977). See 42 U.S.C. 2000e-5(b). Neither an admission nor a finding of liability is necessary to the entry of a consent decree. *Swift and Co.* v. *United States*, 276 U.S. 311 (1928); *United States* v. *City of Alexandria, supra*. In the context of equal employment opportunity, the Supreme Court has held in the absence of a judicial finding of discrimination that Title VII does not proscribe employers from voluntarily adopting race-conscious affirmative action plans. *United Steelworkers of America* v. *Weber*, 433 U.S. 193 (1979). Nor has the Supreme Court recognized any constitutional impediment to race-conscious relief embodied in Congressionally authorized administrative actions, such as consent decrees under Title VII. *Regents of University of California* v. *Bakke*, 438 U.S. 265, 302 n. 41 (1978).

The objections directed at the lawfulness of the decrees should be rejected. Similarly, the provisions of the Consent Decrees are equitable and reasonably adapted to correct the effects of the alleged discriminatory practices in a suitable time frame without excessively infringing upon the interests of white or male employees. Thus, the Court should enter the proposed Consent Decrees.

Argument

I. The Consent Decrees' Provisions are Lawful, Reasonable, and In Accord with Public Policy

A. The Proposed Decrees are Consistent with Allegations of the Complaint and the Substantive Law

In determining whether to enter a consent decree, a district court must assure itself that the provisions of the decree are lawful, reasonable and equitable. *United States* v. *City of Alexandria*,

614 F.2d 1385 (5th Cir. 1980);[1] *United States* v. *Allegheny-Ludlum Industries*, 517 F.2d 826 (5th Cir. 1975), *cert. denied sub nom., N.O.W.* v. *United States*, 425 U.S. 944; *United States* v. *City of Jackson*, 519 F.2d 1147 (5th Cir. 1975); *Airline Stewards & Stewardesses Ass'n* v. *American Airlines, Inc.*, 573 F.2d 960, 963 (7th Cir. 1978).

A district court should enter a consent decree if the relief provided is consistent with the relief which a court could properly grant after findings which reflect the facts alleged in the complaint. *United States* v. *City of Alexandria, supra.* See also, *EEOC* v. *American Tel. & Tel. Co.*, 556 F.2d 167 (3rd Cir. 1977), *cert. denied*, 438 U.S. 915; *Airline Stewards & Stewardesses Ass'n.* v. *American Airlines, Inc.*, 575 F.2d 960, 963 (7th Cir. 1978), *supra*, *S.E.C.* v. *Dennett*, 429 F.2d 1393 (10th Cir. 1970).

The complaint in this action alleges that defendant Personnel Board and defendant City of Birmingham, among others, have engaged in a pattern or practice of employment discrimination against black and female applicants and employees, and seeks monetary and injunctive relief to end the discrimination and rectify its effects. Complaint at ¶14, 15 and prayer for relief. The Consent Decrees resolve the allegations raised in the complaint against the Personnel Board and the City of Birmingham by providing a mechanism for the payment of individual monetary relief and requiring affirmative certification, hiring and promotional obligations.

Almost all of the objections to the decrees concern the prospective affirmative hiring and promotion provisions. However, this type of relief has been approved repeatedly by the Fifth Circuit both in the context of a consent decree with the United States, *United States* v. *City of Alexandria, supra; United States* v. *Allegheny-Ludlum Industries, supra; United States* v. *City of Jackson, supra*; and as an appropriately ordered judicial remedy, *Morrow* v. *Dillard*, 580 F.2d 1284 (5th Cir. 1978); *NAACP* v. *Allen*, 493 F.2d 614 (5th Cir. 1974). Thus, the objections of the Firefighters Association - that the affirmative relief unlawfully discriminates against whites and males and goes beyond what an aggrieved party could obtain through litigation - have been answered by a consistent string of decisions in this Circuit.[2]

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1 *United States* v. *City of Alexandria, supra*, was a companion case to *United States* v. *City of Miami*, 614 F.2d 1322 (5th Cir. 1980), *pet. for rehearing en banc granted and opinion vacated*, 625 F.2d 1310 (5th Cir. 1980). *City of Miami* involved a challenge to a consent decree by police unions which were defendants in the action and had collective bargaining agreements with the City. In *City of Alexandria*, as in the instant case, there are no issues involving any deprivation of rights under collective bargaining agreements.

B. A Judicial Finding of Liability Is Not A Prerequisite To the Entry of the Consent Decree

Because the relief addresses the violations alleged in the complaint, neither a finding by the Court nor an admission of liability is a prerequisite to the entry of the decrees. *Swift & Co.* v. *United States*, 274 U.S. 311 (1928); *United States* v. *City of Alexandria, supra.*

The inclusion of goals and timetables in the decrees does not negate the applicability of this general proposition. *Id.* See also *Patterson* v. *Newspaper and Mail Deliverers' Union*, 514 F.2d 767, 769 (2d Cir. 1975), *cert. denied*, 427 U.S. 911. In *United Steelworkers of America* v. *Weber, supra*, the Supreme Court held that Title VII does not forbid employees and unions from voluntarily agreeing upon affirmative action plans that accord racial preferences. In view of the decision in *Weber* from a purely statutory perspective it would be ironic indeed if an employer and the Attorney General could not enter into a consent decree with race-conscious relief after the Attorney General had reasonable cause to believe that the employer was engaging in a pattern of discrimination.

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2 The Firefighters Association's reliance on *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977) is misplaced. That decision does not support their broad objections. In *Myers*, the Fifth Circuit reversed the district court's approval of a consent decree insofar as it modified certain provisions of a collective bargaining agreement not found to be either in violation of Title VII or insufficient to eliminate the present effects of past discrimination. The Firefighters Association admits that these consent decrees have no effect upon any collectively bargained seniority system, as in *Myers* (Brief, p. 5). *Myers* did not hold, as the Firefighters Association suggests, that a judicial finding of ongoing discrimination must precede all affirmative equitable relief. Such a reading is not only contradicted by a solid line of cases in the Fifth Circuit but is not supported by the factual context of *Myers* itself.

While *Weber* did not involve state action, there is no reason that the outcome should be different from a constitutional perspective. See, *Detroit Police Officers Association* v. *Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, ___U.S.___, No. 79-1080, June 15, 1981. In *Regents of the University of California* v. *Bakke*, *supra*, the opinion of Justices Brennan, White, Marshall and Blackmun rejected the notion that judicial findings of discrimination are necessary to the implementation of race-conscious remedies by governmental bodies. Disagreeing with the argument that the *Bakke* case is distinguishable from employment discrimination cases that approved race-conscious remedies because those remedies were supported by judicial findings of prior discrimination, they stated:

> These cases cannot be distinguished simply by the presence of judicial findings of discrimination, for race-conscious remedies have been approved where such findings have not been made. Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine effects to achieve voluntary compliance with the requirements of law. And, our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action. 438 U.S. at 364 (citations omitted).

In addition, Mr. Justice Powell, announcing the judgment of the Court, specifically made reference to consent decrees under Title VII containing such remedies. While stating that the Court had never approved preferential classifications in the absence of constitutional or statutory violations, he carefully pointed out that:

> This case does not call into question congressionally authorized administrative actions, *such as consent decrees under Title VII* or approval of reapportionment plans under §5 of the Voting Rights Act of 1965. In such cases, there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations. . .and particular administrative bodies have been charged with monitoring and formulating appropriate remedies. 438 U.S. at 302, fn. 41 (emphasis added, citation omitted).

In the instant case not only do we have an administrative determination by the Attorney General of a pattern of discrimination by defendants, but also a history that includes this Court's January 10, 1977 Decision and Order and an extensively developed record in subsequent trial proceedings. Thus, the absence of a judicial finding of liability for each specific violation presents no obstacle to the entry of the Consent Decrees.

C. The Voluntary Elimination of Employment Discrimination Is National Public Policy

The elimination of discriminatory employment practices prohibited by Title VII of the Civil Rights Act of 1964, as amended, is a policy of the "highest priority." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763 (1976); *Alexander* v. *Gardner-Denver*, 415 U.S. 36, 47 (1974); *United States* v. *Allegheny-Ludlum Industries*, *supra* at 846-47.

The enforcement scheme of Title VII relies primarily on obtaining voluntary compliance. As the Supreme Court noted in *Emporium Capwell* v. *Western Addition Community Organization*, 420 U.S. 50, 72 (1975), "Congress chose to encourage voluntary compliance with Title VII by emphasizing conciliatory procedures before federal coercive powers could be invoked." See also, *Alexander* v. *Gardner-Denver*, *supra*, 415 U.S. at 44; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-18 (1975).

The Consent Decrees represent a satisfactory settlement which achieve voluntary compliance with Title VII and further Congressional intent without additional litigation burdens and expense to the parties and the taxpayers.

II. The Affirmative Hiring and Promotion Provisions are Reasonable, Fair and Appropriate

A. The Civilian Labor Force of Jefferson County is an Appropriate Yardstick to Measure Achievement of Long Term Goals

In both Consent Decrees the defendants agree to adopt as a long term goal, subject to the availability of qualified applicants, the employment of blacks and women in each job classification

specified in the decrees in percentages which approximate their respective percentages in the civilian labor force of Jefferson County. Personnel Board Decree ¶5; City of Birmingham Decree, ¶23. The Guardians Association has suggested that the racial composition of the population of the City of Birmingham should be reflected in any long term goal. Johnny Morris, et al. have objected to the civilian labor force as a measurement device because they say there is no relationship between the percentage of blacks and women in the Jefferson County civilian labor force and those qualified to hold merit positions in the Birmingham Police Department. Beside providing no support for any more reliable or appropriate labor force figures, the objectors fail to account for the concept of a relevant labor pool and the flexibility built into the decrees to address that issue.

The Supreme Court has noted that "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 340, n. 20 (1977). The vast majority of employees in the Jefferson County Personnel system reside in the County. Moreover, the County constitutes the labor market from which most applicants are derived. Thus, the selection of the county civilian labor force comports with the factual background of this case, including the relevant geographical area of applicants and incumbents. See *Patterson* v. *Newspaper and Mail Deliverers' Union*, *supra*, 514 F.2d at 772.

Where it is shown that blacks and/or women possess qualifications required for any of the job classifications in percentage terms which are inconsistent with the specified goals, the Consent Decrees permit appropriate adjustment. Personnel Board Decree, ¶24; City of Birmingham Decree, ¶5. This flexibility allows the parties to adapt the goals to the relevant labor market in accordance with the teaching of *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). However, where no special qualifications are required for a position, such as entry level police and fire positions, the civilian labor force represents an appropriate yardstick consistently recognized by Courts throughout the country. See, e.g., *NAACP* V. *Allen*, 493 F.2d 614 (5th Cir. 1974); *United States* v. *City of Chicago (Police Dept.)*, 549 F.2d

415 (7th Cir. 1977), *cert. denied sub nom. Arado* v. *United States*, 434 U.S. 975 (1975).

B. The Interim Certification, Hiring and Promotion Goals are Reasonable and Appropriate

The interim goals in the Consent Decrees for different job classifications range from 25 to 50 percent for blacks and from 15 to 30 percent for women. As objective measures of progress in meeting the long term goal, the achievement of the interim goals is subject to the availability of applicants deemed qualified on the basis of job related selection criteria. The goals are temporary and do not create a bar to the hiring or advancement of white males.[3] See *United Steelworkers of America* v. *Weber*, *supra*. Interim goals of this kind have of course repeatedly been approved in this Circuit. *United States* v. *City of Alexandria*, *supra*; *NAACP* v. *Allen*, *supra*.

Of course whites and males will be affected by the operation of the Consent Decrees. However, it is an overstatement to say that they have "vested" rights in the merit system, when aspects of the system have been alleged and, with respect to police and fire testing, found to be discriminatory. In any case it is not unreasonable for third parties' interests to be affected by the decrees even though the third parties did not cause the discrimination. As the Supreme Court has stated:

> . . . we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will

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3 In the objections of Johnny Morris, et al., it is pointed out that the decrees do not recognize the vested interest of employees who have permanent status on the layoff lists. (Brief, ¶5). It was not the intent of the signatories to the decrees that the interim goals would supersede the operation of bumping or recall rights. The goals apply to new hires or promotions only.

be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.

Franks v. *Bowman Transportation Co.*, 424 U.S. 747, 774-75, 777-78 (1976) (citations omitted).

III. Recordkeeping and Reporting Provisions are Instrumental to the Implementation of the Consent Decrees

Johnny Morris, et al. have objected to the recordkeeping and reporting provisions of the City of Birmingham Decree on the grounds that they violate the right to privacy. Such provisions are necessary to monitor effectively the progress of compliance with the decrees. Recordkeeping and reporting provisions of the kind included in these decrees have been ordered both in consent decrees and in litigated cases. See *United States* v. *Allegheny-Ludlum Industries, supra, United States* v. *City of Jackson, supra, United States* v. *Jacksonville Terminal*, 451 F.2d 418, 460 (5th Cir. 1971); *James* v. *Stockham Valves*, 559 F.2d 310, 356 (5th Cir. 1977). Johnny Morris, et al. do not articulate how these provisions intrude on any protected rights of privacy. Moreover, the judically [sic] recognized need for such provisions outweighs any vague claims of privacy.

Conclusion

For the foregoing reasons, this Court should enter the Consent Decrees with the terms and provisions as agreed to by the parties and submitted to the Court.

Respectfully submitted,

/s/ S. Theodore Merritt
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[Certificate of Service, dated July 28, 1981, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. JEFFERSON COUNTY, and BEN L. ERDREICH, THOMAS W. GLOOR, CHRIS H. DOSS, COMMISSIONERS, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 75-P-0666-S

* * *

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August 3, 1981 9:00 A.M.

PROCEEDINGS

THE COURT: Case 75-666, United States of America vs. Jefferson County and others, and related cases.

This matter is before the Court at this time for consideration of whether to give approval to a proposed consent decree tendered by the private plaintiffs in these cases, the United States of America, the Jefferson County Personnel Board, and the City of Birmingham.

Notice of the general terms of the proposed settlement have been previously given by newspaper. A certificate to that effect has been filed with the Court. The consent decrees themselves as proposed have been on file.

The notice provided that any persons who wished to object to the decrees should have until July 14th, at 4:00 o'clock

in which to file written objections, then they would be heard at this time, along with any evidence or argument presented by those proposing the consent decrees.

There was filed by the deadline an objection on behalf of three separate groups. Johnny Morris and six other individuals filed objections, Billy

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Gray, and the Birmingham Firefighters Association, No. 117, filed objections, and the Guardian Association likewise filed timely objection to portions of the decree.

Received after the deadline was a protest or objection filed by a James F. Miller. I don't know if Mr. Miller is in the court or not. Is Mr. Miller here?

Mr. Miller, that objection was filed out of turn. I don't know whether you wish to be heard in connection with why I should permit any consideration of your objection by virtue of it being filed too late. I don't know whether the parties proposing the decree have any objection to Mr. Miller's objection being considered.

Essentially it mirrors to some degree objections filed on behalf of the others, in effect saying that his rights would be jeopardized by preferential treatment given to others. That's in essence the nature of his objection.

Is there any objection by the proponents of the settlement to the Court's considering Mr. Miller's objection, even though it was filed some five days late?

MR. RITTER: Your Honor, we probably wouldn't

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have an objection, but before we formally indicate our position on the record we would like to see a copy of Mr. Miller's objection. I don't believe any counsel for the parties have had an opportunity to look at that objection.

THE COURT: I can read it to you. It's very short.

MR. RITTER: Thank you.

THE COURT: "I, James B. Miller, do hereby request to be present at the hearing in order to oppose your decision on the hiring process and back pay for minorities simply because it does not meet the standards that the Jefferson County Personnel Board has set for hiring for Civil Service jobs. I oppose the decree because it has affected my family and myself by not being hired as a patrolman, and the pay increase I would receive if the decree had not been issued." Signed James B. Miller.

MR. ALEXANDER: The City has no objection to the consideration of the Miller objection, Your Honor.

MR. SPITZ: The Martin plaintiffs have no objection, Your Honor.

MR. RITTER: No objection.

MR. ADAMS: No objection.

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MR. WHITESIDE: And the Personnel Board, Your Honor.

THE COURT: All right. It will be considered, Mr. Miller, although untimely.

First of all, the question before the Court is the status for purposes of this hearing of those filing the objections, and more particularly the status of the Guardian Association, and of Birmingham Firefighters Local 117. It's my view that I should treat the objections filed, or the papers filed on behalf of those two organizations as being a request to be heard Amicus Curiae, and I should permit hearing from those two groups Amicus Curiae, although not as formal parties, that insofar as the individuals are concerned, which would be Mr. Morris and the others who joined in his petition, Mr. Gray and now Mr. Miller, I should treat them as interested parties, persons, and accorded that position which is a little bit more direct interest than the interest of the Guardians and the Firefighters, No. 117.

Does anyone wish to be heard contrary to the Court's view on that?

MR. FITZPATRICK: Judge, Ray Fitzpatrick for the Firefighters and Gray, I don't have anything contrary to that. I would like to state that we

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would — we plan to request intervenor status in the case, and I plan on filing a motion this afternoon requesting such status.

THE COURT: Well, I'll have to deal with that when it's filed. But, insofar as the present papers are concerned, you would agree that they should be treated, or allowed the status of Amicus Curiae?

MR. FITZPATRICK: Yes, sir. That's what we asked for.

THE COURT: All right. The same thing I take it would be true insofar as the Guardians are concerned.

MR. THOMPSON: That's correct, Your Honor.

THE COURT: All right. It will be so ruled then.

Now, I'm not sure what those filing objections or those proposing the settlement had in mind in terms of either argument or evidence. Perhaps I could have some statement by counsel as to your desires in that respect.

MR. RITTER: Your Honor, we have some computer printouts that we would like to offer into evidence to supplement the rather extensive trial record that has been generated to date. There are a couple of summaries that are based on those printouts

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that we would also like to put in the record. And beyond that I don't believe there would be any further evidence that the parties to the consent decree would wish to present to the Court.

However, there may be some additional matters that we may wish to present in rebuttal after we've heard in detail the substance of the objections.

THE COURT: All right. If I understand you correctly, you will be asking to file certain summaries of data, and beyond that, to reserve the right to put on evidence or argument after hearing from the objectors?

MR. RITTER: That's correct, Your Honor.

THE COURT: Is that statement true for all of the existing parties?

MS. REEVES: Yes, sir.

MR. ALEXANDER: We join in, Your Honor.

MR. ADAMS: Yes, sir.

THE COURT: Let me take a look first at the nature of the materials tendered.

I take it that these exhibits in large part relate to statistics concerning the City of Birmingham, although one of the exhibits is one from the Jefferson County Personnel Board that presumably affects more than the City of Birmingham?

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MR. RITTER: Yes, Your Honor. The exhibit that you have there, that you're looking at now, we would probably wish to reserve offering that exhibit into evidence until we have heard the objections. The exhibit that you have before you would be used to address the time in grade issue. I'm not sure whether additional evidence is going to be necessary on that or not. But, the other computer printouts that you have, Your Honor, are exhibits that we would like to offer before the objections are heard. That would be Plaintiff's Exhibits 1 through 4.

THE COURT: All right. Exhibits 1 through 4 will be received, and the tender of the Exhibits 5 and 6 and 7 will be deferred.

MR. RITTER: Thank you, Your Honor.

THE COURT: All right. What is the position with respect to the objections insofar as presenting either evidence or arguments?

MR. FITZPATRICK: I had just planned on presenting a very short oral argument.

MR. THOMPSON: Your Honor, the Guardian's position would be a rather brief statement in support of the position they have taken in the memorandum.

THE COURT: I thought we had three groups.

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Mr. Miller, did you wish also to be heard either by way of evidence or argument?

MR. MILLER: Yes, sir.

THE COURT: All right. Then, I'll call on the Objectors for their statements of position and outline of their position.

MR. FITZPATRICK: May it please the Court, I feel a little bit like a fish out of water here with all of these eminent Government attorneys who are so skilled in this area of the law, and I really am a little bit overwhelmed.

But, I would like to state that I did receive two briefs on Friday, one on behalf of the City, and the other on behalf of the Government. I would request a few days leave to file a reply brief to their briefs.

And I also did receive a brief on behalf of the Martin plaintiffs this morning, which was short, and I'm not sure if it even spoke to the objections that we raised, but I would request leave to file a short reply brief by the end of the week.

Upon a reading of the briefs, of the Government's brief and the City's brief, it would seem to me initially upon a quick scanning of the brief that there's no question of the propriety

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of the decrees. But, as I looked closer at the cases that they relied on, it appeared to me that their primary reliance is on two

companion cases, *U. S. v. City of Miami, Florida*, and *U. S. v. City of Alexandria, Virginia*, which are both cases out of the Fifth Circuit.

THE COURT: Alexandria, Louisiana?

MR. FITZPATRICK: Yes, sir. The *Miami* and *Alexandria* cases were the first occasion for the Fifth Circuit to address the propriety of a code of policy since the decisions of the Supreme Court in [*Bakke*] and *Steelworkers v.* [*Weber*], which came out in June of '79. The *Steelworkers* was a five to two decision, in which the Supreme Court upheld the voluntary quota plan entered into between a private employer and the Government, over the objections of the Steelworkers Union.

The Court expressed at the outset in its opinion the narrowness of the decision. It stated that the subject affirmative action plan did not involve State action, and hence there was no alleged equal protection violation.

In the *City of Miami* case there were three decisions filed, three opinions filed. Judge Goldburg's prevailing opinion upholds the consent

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decrees entered into between the City and the Justice Department over the objections of the Miami FOP. Judge Goldburg expressly acknowledges in footnote 27 that the *Steelworkers* case was not controlling in a situation involving municipal employers.

Judge Gee's dissenting opinion rejects the proposed consent decrees, and notes that the prevailing Judge's opinion constitutes a landmark decision in that it sustains preferential treatment of classes based on race and sex in the form of hiring and promotion quotas against Constitutional attack on the Fourteenth Amendment grounds.

Judge Thornbury concurred with Judge Goldburg. In so doing he stated that the authority for approval of the consent decrees was debatable. He stated, "Certainly we cannot say that the decision is compelled by Supreme Court or Fifth Cir-

cuit precedents, but just as emphatically we urge neither is it prohibited by any controlling authority."

In answer to that statement we would state that the clear perception of Congress in Title VII at 2000(e)(2)(j) is enough of a prohibition without a Supreme Court decision to the contrary.

We acknowledge that Judge Goldburg's opinion articulates the position of the proponents of these

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decrees as far as their legality is concerned.

On the other side, Judge Gee's dissenting opinion stands for the arguments of the Firefighter objectors.

A petition for rehearing en banc was filed in the *Miami* case, and the case was submitted to the full Court on January 11th of this year. I checked with Atlanta Friday afternoon, and there was no decision at that time. The case is still under submission and has been so for some seven months.

If the program of quotas urged by the proponents is routinely legal, as the proponents allude in brief, then why has the *Miami* case remained under submission for seven months? The decision of Judge Goldburg is not final and not of controlling authority. We submit that there is no authority that a municipality may discriminate on the basis of race and sex under the color of a consent decree without a present ongoing discrimination.

The Justice Department's counsel did not allege that Miami is good law as the City does in its brief. Justice relies more on the companion case of City of Alexandria.

THE COURT: Let me get you off for a moment of the discussion of the Fifth Circuit cases, to be

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more specific about the actual objections that you are filing, which you have listed six.

MR. FITZPATRICK: Okay. I was winding up in the case law and coming to that, sir.

THE COURT: Okay.

MR. FITZPATRICK: In essence, as far as the case law is concerned, we take the position that it's unsettled at this time, it's still pending in the Fifth Circuit, and it's not clear that in a case involving a municipality, as we have here, the *Miami* case is very similar to this case, it's not clear that the quota system as far as entry level and promotional positions is proper.

We do not yet have findings by the Court of an ongoing actual present discrimination against blacks and females by the City or the Personnel Board at this time. The City decree in fact acknowledges the good faith efforts of the City in furtherance of affirmative action.

I stand firm on the citation of our brief of *Myers v. Gillman Paper*, that back pay is the proper remedy for past wrongs, while injunctive relief is the only proper remedy for a continuing wrong. It's our position that there is no continuing wrong at this time.

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I stand firm on our objections to the quotas provided for females. It was acknowledged in the Court's '77 decree that the sex discrimination claims were dropped for lack of evidence.

We object to the broad injunctive relief ordering the City and the Personnel Board to drop the high school education requirement, and the lack of a criminal record requirement.

At the present time we have no findings that such requirements constitute ongoing discriminations against blacks and females. In fact, such requirements are reasonably related to the efficient functions of the Fire Department. In order to efficiently perform their jobs more and more firefighters are being trained as paramedics, who operate in the field, while in communication with an emergency room physician.

I recently received a telephone call from an emergency room physician at Carraway Hospital, who was distraught about the possibility of people being under his supervision, while administering medical treatment in an emergency situation, who could be convicted criminals or inadequately trained in their field.

He stated to me that Federal and State law

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prohibits convicted criminals from being able to administer controlled substances, which paramedics do on a routine basis.

And he stated to me unequivocally that one would have to have at least a high school diploma to comprehend the complex material that today's firefighter-medic needs to be apprised of.

We stated in brief and we state here again today that we do not oppose equal opportunity for all. That is our national policy. We do question whether quotas is national public policy.

I have recently read in the ABA Journal of the Reagan Transition Team's report on the EEOC. The report concluded that EEOC has not been following Title VII in pushing for consent decrees with hiring and promotion quotas. I seriously question whether these decrees are consonant with the public policy of our current administration.

The law provides that the provisions of a class action consent decree may not be unlawful, unreasonable, or inequitable. The proposed consent decrees are, one, outside of the provisions of the law under both Title VII, and violate the Constitutional rights of these objectors, without evidence of ongoing present discriminations; two, they unreasonably

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go too far in the scope of relief when the City is already achieving its objectives under its affirmative action ordinance; and three, they are inequitable in making the present white male employees of the City bear the burden and cost of the past violations of the civil rights of the plaintiffs by the City and the Personnel Board.

The City should make restitution through adequate back pay to the victims, to the actual victims of the discrimination, rather than passing the burden on to its innocent employees.

We respectfully urge the Court not to approve the decrees and to return the parties to the negotiating table.

THE COURT: I would like you to indicate what specific portions of the decrees you object to. I understand you to be generally objecting on the basis that there's not been evidence of or a finding of present ongoing discrimination, and that would impair in your view the entirety of the agreements.

MR. FITZPATRICK: Yes, sir.

THE COURT: Beyond that, which covers and permeates the entire agreements, what portions of the agreements are you objecting to?

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MR. FITZPATRICK: Specifically what comes to mind, and not just limited to this, the hiring quotas for females.

THE COURT: That's with respect to the City of Birmingham's decree, and in turn the Personnel Board's decree as it relates to the Firefighters in the City of Birmingham?

MR. FITZPATRICK: Yes, sir. We object to the dropping of the high school education requirement with respect to both decrees. We object —

THE COURT: As it relates to the Firefighters?

MR. FITZPATRICK: Of course. We object to the dropping of the criminal record requirements, the criminal records standards.

THE COURT: You understand that the only thing that has changed there is that it shall not automatically bar a person from employment?

MR. FITZPATRICK: Yes, sir.

THE COURT: And that there shall be taken into account various factors concerning what criminal offense, when it was committed, rehabilitation, and indeed the nature of the job for which the person is being considered?

MR. FITZPATRICK: I understand that was in the decree, yes, sir. Offhand —

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THE COURT: I take it there is at least one other, which is the preferential selection of a black to the position of Fire Captain?

MR. FITZPATRICK: Fire Captain. Well, on each level up the line in the providing of quotas for the promotional positions.

We also would object to the dropping of the time in grade requirements. We think those are reasonably related to the efficient functioning of the department.

It's the position of the Firefighters that on-the-job experience cannot be exchanged for book knowledge, or whatever, and the Firefighters are concerned that their superior officers do have adequate on-the-job experience.

THE COURT: You do understand that the same time in grade would apply to whites, blacks, males and females, so at least as I understand it there's no distinction made between the time in grade requirements for any person.

MR. FITZPATRICK: I understand that, yes, sir. I do question whether that is the proper subject for civil rights litigation.

THE COURT: Well, I have some question about that in the abstract myself.

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On the other hand, I'm not sure that I have any power particularly to say no. If they want to do it, why not?

MR. FITZPATRICK: I believe that it is, under the class action, under Rule 23, when the Court approves a decree, the

Court must be satisfied of the legality of all provisions of the decree, and

THE COURT: Well, there's nothing illegal about changing the time in grade. It's something that is incorporated in the proposed settlement by virtue of some complaints that have been made on behalf of the plaintiffs.

MR. FITZPATRICK: There's nothing that says it's legal and there's nothing that says it's illegal, right.

THE COURT: But, why would I have any role to play in terms of preventing the change on time in grade, unless that it were shown that the change on time in grade contravenes some Federal law, which as far as I can see it doesn't, and there's been no indication that the change of the time in grade would adversely affect blacks or whites, or males or females.

I have some difficulty understanding how I would get involved in deciding on that particular

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issue. If the parties want to do it, why not?

MR. FITZPATRICK: I can think of no response offhand, Your Honor.

THE COURT: It seems to me that the same basic response is, with respect to the criminal record and the high school education, that if the parties want to do it, it may or may not be generally speaking in the public interest, in a broad context, but if the parties want to do it, they are free to do it, with or without the Court's approval.

MR. FITZPATRICK: Well, I think, though, that the Court is approving this, and the Court is putting its stamp of approval on this, and with them — I don't think the Court should endorse something that is outside of the public interest.

THE COURT: Well, suppose they pulled it out of the consent decrees, didn't have it in the consent decrees, but nevertheless the Personnel Board and the City made the changes on high school education and criminal record, it doesn't violate

anybody's rights. The people may not like the change, but whose rights are violated by it?

MR. FITZPATRICK: I cannot think of anything offhand, sir.

THE COURT: It seems to me that the critical

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matter relates, insofar as your argument goes, to the hiring and promotional quotas.

MR. FITZPATRICK: Yes, sir. And the overall scheme of the consent decrees. And as I stated earlier, we do plan on requesting intervenor status, and will file the appropriate motions.

THE COURT: It may be a little late, but I am hearing you.

MR. FITZPATRICK: Well, I wrote it out yesterday, but I didn't have anyone to type it.

THE COURT: Okay.

MR. FITZPATRICK: Okay. Anything further, sir?

THE COURT: Thank you.

MR. FITZPATRICK: Thank you, sir.

THE COURT: The Guardians?

MR. THOMPSON: May it please the Court, Your Honor, our position here, the Guardian's position, is somewhat of a difficult one in that the Guardians don't really object to all of the features in the proposed consent decree. In fact, probably to do so would be more like cutting your nose off to spite your face.

Obviously the Guardians would take whatever encouragement it could in seeing that a consent

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decree is effectuated, because that would then give them a better position in terms of employment and promotions than they enjoy at the present time.

Now, what the Guardians have done is to file an objection that is more in the nature of saying that the proposed consent decree does not deal with some fundamental issues that will make it fully effective in achieving promotions and employment opportunities that the Guardians would suggest that the proposed consent decrees are designed to do.

Now, the Guardians have objected in terms of police officers admitted to the Academy, they have objected to the promotions in regards to superior positions of Sergeants, Lieutenants, Captains, and up the line.

Let me begin by saying that one of the reasons the Guardians have proposed that the number of individuals admitted in the Academy class be increased to seventy-five percent black is that that is the only way that the number of black police officers that are actually employed, not necessarily ones that are interviewed as applicants, but are actually employed, can be increased, that is, by increasing the number of individuals actually admitted

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and graduated from the Academy.

Now, some of the statistics that we have in terms of just numbers is that, and this information is available to me from a related, well, not a related matter, but a lawsuit that involves this department, and was provided me as late as six months ago. But, let me just give the Court some statistics in regard to the sworn police officers that are not employed by the City of Birmingham.

In the latest data that we had for the year 1980, where you had five hundred and sixty-six white male police officers employed, you had thirty-seven white females, you had a total of fifty-eight black males, and seventeen black females.

In the year of 1979, the year ending for 1979, you had, of a total number of sworn police officers, you had five hundred

and forty-seven white males, thirty-one white females, forty-four black males, and eight black females.

For the year ending 1978 you had a total number of five hundred and eighty-three white males, thirty-two white females, forty-five black males, and nine black females.

And for the year ending 1977, you had a total of five hundred and seventy-three white males,

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twenty-six white females, forty black males, and six black females.

Now, just dealing with the police population itself, we look at — in 1977 you only had forty black males that were sworn police officers.

In 1980, and incidentally, this is only up to November, October of 1980, you only had fifty-eight black males that were employed as police officers. This raised serious questions with the Guardians, because they cannot see any significant increase, and they recognize that the only way that you can have a significant increase is the number of officers that are actually graduated from the Academy. So, that is the question of why they are saying that if you merely set some non-specific goals, or if you set some general philosophic goals of saying fifty percent, without having some precise standards in which to implement this, and without having some precise measures that go into effect immediately, you will not achieve the admirable goal of fifty percent black police officers, if that is in fact a goal of the proposed consent decree, or as a result of the tenor of the entire consolidation of the lawsuits that have been filed.

Additionally, we have raised objections regarding

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the promotions of police officers, black police officers from the position of Patrolman to Sergeant and above.

Again quoting some statistics in terms of the police officers, in 1977, with the year ending, we had, of the number of

Sergeants we had, there were one hundred and forty-six white male Sergeants, zero females, and two black males.

In 1978 there were a hundred and forty-four white male Sergeants, one female, and three blacks.

In 1979 you had a total of one hundred and forty-one white male Sergeants, three white females, three blacks.

And in 1980, up until October of that year, you had a hundred and forty-two white male Sergeants, two white females, and three blacks.

Again, it is a significant concern to the Guardians, the position of Sergeant, because that is the entry level in which the blacks, or women, or whoever are aspiring to these positions begin to rise to the other superior officers, such as Lieutenant, Captain, Deputy Chief, and indeed Chief of the Police Department.

The issues that concern the Guardians particularly is that unless you have a significant

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infusion of blacks into that level of Sergeants on some significant basis, that you will never have any black officers ever to rise, and not just in five years, which may be a number that is tossed in the consent decree, or in the language of the lawsuit, but in the next fifty years if you do not have that infusion of blacks into that level, then it is unlikely that you will ever have blacks rising to the positions that would qualify them to serve in other superior officer positions.

Now, I guess the tenor of our argument as regards the position of Lieutenants and Captains are parallel to those that I tried to iterate with regard to the position of Sergeant.

One of the — another objection that we have raised that ties into this whole matter is the issue of how officers, patrolmen, become superior officers, how they rise to the ranks of Sergeant and above. And, of course, in the past there has been the testing as a chief mechanism for the advancement of patrolman to the position of Sergeant and above.

One of the main concerns that has been raised by the Guardians is that this issue of testing has had a long range and continuous effect in terms of adverse impact on blacks, and that should be looked at

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seriously.

And one of the ways of trying to reduce or eliminate impact of the testing is to eliminate that, and to get to standards and criterions that are effective in measuring the individual's ability to perform in these positions of Sergeants and above. And we have suggested that perhaps the consent decree really ought to look at ways of measuring those in terms of experience, education, leadership skills, ability, knowledge, and goals and objectives of a police department, longevity and training. We believe that these are criterions that truly measure the ability of an individual to perform in the position of Sergeant, and indeed of superior positions above that of Sergeant.

So, we suggest and submit that if the consent decree does not get to this issue of how you increase the number of blacks in the Police Department in those superior positions, and merely set out the, for example, that they will fill the next four positions, or the next in Sergeant, or the next two positions in Lieutenant, that that really does not get at the issue of improving the positions of blacks in the ranks of police officers.

Merely to say that we will fill those in terms

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of promotion itself is that the number, first of all, is meaningless. If you look at now, there are currently around a hundred and thirty Sergeants that are white males and females on the books today, and then to merely have a number of six black Sergeants, and to look at the ratio that I have indicated in the statistics that I read earlier, we will see that merely suggesting that number will not at any point in time achieve the effectiveness that I think the consent decree is designed to achieve. And that would be true, too, in terms of Lieutenant. That is why the Guardians have proposed that some significant number, and the

number that came forth from that organization was twenty-five blacks be immediately promoted to the position of Sergeants, and that the next four Captains and the next eight Lieutenant slots be filled by black police officers. That way we think that you — in a sense you do have a rather dramatic impact, but you also have an impact that is sure to have some effect in terms of a realistic goal of having an integrated Police Department that truly reflects not only the work force, but the composition of the City of Birmingham.

Another objection raised by the Guardians, of course, goes to the issue of getting individuals

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as applicants into the Police Academy as it is now structured, and that issue is one of background investigations. The Guardians have been privileged on a number of instances to have had individuals to come before them, to indicate that they have been arbitrarily denied because of the way the background investigation is conducted by the City of Birmingham. The objection is that this process should be evaluated and substantially modified, so that the way it is conducted now, with its arbitrary questions, and with its arbitrary way of determining the physical fitness, would be subject to the scrutiny and some articulated standards that would insure that an individual would not be rejected to the Police Academy based on one individual asking an arbitrary question and not having to answer to anyone as a result of excluding that individual.

THE COURT: Well, doesn't the City decree provide a mechanism so that people who are disqualified by virtue of the background investigation would have an opportunity to know why and be heard?

MR. THOMPSON: This proposed consent decree does provide a mechanism. The only thing that we are not sure of is that even by giving an individual who has been rejected the right to reply to that,

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that you cannot avoid that simply by having a panel of some group that you can repose trust in in terms of not rejecting people in the first place.

THE COURT: I'm not sure I understand.

MR. THOMPSON: In other words, you do give the rejected individual, the grievant, the right to come back and to be told why he was rejected, or why she was rejected. That individual does have a right to express that, is that correct? Yeah.

What our position is, is that instead of having to subject that person to have to come back, that some group ought to be set up that we consider would be a group that is composed of black and white that would be fair in making their evaluations.

THE COURT: Well, is there not a provision for an affirmative action committee within the Police Department?

MR. THOMPSON: Presently there is, I think there is an individual who sets up to hear problems like that in the Police Department.

THE COURT: I'm referring to the consent decree, does it not provide for some such committee?

MR. THOMPSON: That's correct. There is a mechanism for that.

THE COURT: Well, if I understand you

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correctly, in asking for twenty-five black Sergeants immediately, you're asking that one out of every three black policemen be made a Sergeant?

MR. THOMPSON: Out of the present number that would be what it would amount to. The only other thing, Your Honor, is that we're saying that unless you have some significant numbers being made Sergeants, then you are back into the issue of tokenism, and it doesn't really make any difference whether you have three or six.

THE COURT: Thank you. Is there anyone here to speak on behalf of Johnny Morris, Jesse Sprayberry, B. R. Stevens, J. R. Davis, John Dipiazo, Juanita Eaton, or Barbara Buckland? They, of course, may speak on their own, as well as being heard through counsel.

All right. Other than what is stated by way of written objection, then the Court takes it that those objections are not otherwise being asserted in this hearing.

Mr. Miller, if you would come forward, please, sir.

MR. MILLER: First of all, I would like to thank you for my opportunity to speak. Thank you.

May it please the Court, Your Honor, I would

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like to more or less give my own statements as to why this has affected me. An unrelated case that has just recently been on file with the U. S. Court of Appeals out of the Chicago District, April 16, 1981, *Carl Parker, Jr. v. B & O Railroad*, this is a promotional process that was just handed down where — excuse me, I've never been here before — Carl Parker was passed over, a white man was passed over through promotion for a supervisor because of an affirmative action program, where they promoted three blacks ahead of him. He filed a suit, and he won his case.

And I would like to think that that would stand as far as the way the public view has changed, that we want the best qualified people for the job. And the way he won this is that he proved that his rights were trampled, the same way mine were, I feel.

I am employed by the City of Midfield as a police dispatcher. I took the Personnel Board test, I scored an 89.78. I was placed 318th on the list. With Judge Pointer's ruling I have been unable to be certified as a patrolman.

My wife worked when we were married. I went through school. I have not been able to finish. My wife worked hard, and I feel like my rights have

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been violated. I have not been able to achieve the goal which I set out.

THE COURT: Let me interrupt you just a minute. Mr. Miller, you said that you are now employed by the City of Midfield as a dispatcher, and that you have been seeking to become a patrolman. Is that for the City of Birmingham, for the City of Midfield, or —

MR. MILLER: That's for Jefferson County.

THE COURT: Within any jurisdiction within Jefferson County?

MR. MILLER: Yes, sir.

THE COURT: And the test that you are referring to was one of the earlier police officer tests, Deputy Sheriff tests?

MR. MILLER: Yes, sir.

THE COURT: Have you been certified to any employing agency?

MR. MILLER: No, sir, I have not. With the practice as has been handed down, and according to the Personnel Board, if they had gone with their final decision, I would have been certified as a patrolman, or somewhere in that capacity as a Deputy Sheriff. Otherwise, with the way things have gone, I have been set back, people have been put ahead of

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me that either have failed the test or scored below me.

I feel like my score was an achievement that I tried all of my life to follow up. I promised my family that. And I have been set back in the way things are going now. There's no way of telling when I'll be hired, if I will be hired.

Racial barriers have been put up through the judicial courts, and this can go on and on and on, to achieve a racial balance. I do not see how we can, with the Guardian's decision, or statements that there were forty black police officers in the

City of Birmingham in '79, and there are fifty-eight now, if we check our statistics through, I would like to know how many black police officers have got ten years or more experience. This is not only with blacks, this is also with whites. People tend to quit, pressure gets to you, the pay is not all that good.

Also, another aspect I would like to bring out is the breakdown. Right now this is only associated with blacks and whites, male and female. Eventually it's going to get to Cubans, Germans, Indians, short people, tall people, and also homosexuals. Eventually it's going to come to it. And I would like to know

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where the Courts would stand when it does come down to those other ethnic groups.

I myself, I can claim that I am Indian and possibly be hired. I can claim I am homosexual and probably be hired as a minority. A change in status would not be that hard.

A recent decision with the Equal Employment Opportunity Commission, where a Sally Rodriguez was being certified as a minority, it was brought to the question that she put on her application, a white female. A supervisor with the Equal Opportunity Commission said that she had to be qualified as minority with the name Rodriguez, that she could change it and be classified as a Mexican-American. To me there's no way to prove the difference. There's no way to prove that I am a white male, there's no way to prove that there is a black male.

I myself can go back through my records, trace my roots, as you would, and probably come up with some different kind of line that everybody is a minority in the United States.

I would like to see Judge Pointer either totally abolish the Personnel Board, let every municipality in Jefferson County, the City of Birmingham, set up their own hiring practices, or

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let the Personnel Board operate the way it's supposed to operate, the best qualified for the job.

When I took my test, on the back of my card it said you would be hired regardless of race, creed, color, or national origin. I took that test with the understanding that when I passed it they would take into consideration my score, and be placed on the list according to that, and not a two list, a black list, white list, male and female list.

THE COURT: When did you take the exam, Mr. Miller, that you are referring to?

MR. MILLER: The last one was in September of 1979.

THE COURT: Is that list still current? Are you still on it?

MR. MILLER: I'm still on the list. The way I have checked, now they are roughly somewhere in the two hundreds in the white list, and they have gone below the five and seven hundreds in the black list. And that's with, I understand, your ruling certifying one black candidate to every white, to every two whites. Thank you.

THE COURT: Okay. All right. Proponents of the consent decree?

MR. RITTER: Your Honor, I would first like

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to make some general comments on the two consent decrees, and then to address some of the specific objections to the decrees that have been raised.

Before I do that, it's my — we are assuming in our brief and in our comments here today that the Court has the benefit of the full trial record in the two trials that have been conducted to date, and that in reviewing the two consent decrees the Court can properly take notice of the trial record that has been developed to date.

THE COURT: I certainly will, and intend to take notice of that trial record. Whether you call that a benefit or not, I'm not sure whether the word is apt, but —

MR. RITTER: All right. Thank you very much.

Your Honor, we believe that the consent decrees that you have before you today for final approval are fair, reasonable and lawful. The decrees are designed to bring to a close over seven years of rather complex litigation and rather costly litigation between the parties. We developed a rather extensive trial record as a result of two trials and one appeal.

As we point out in our briefs, the law generally favors settlements, and this is particularly

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true in Title VII litigation where you have these kinds of social interests involved.

We believe to the extent that the two decrees contain affirmative hiring goals and promotion goals for blacks and women, that these goals are lawful, that they do not unlawfully discriminate against whites. The goals are contingent upon the availability of qualified applicants. They do not totally foreclose the hiring and promotion of white males, and they are temporary measures which are designed to end when certain minimum attainment levels are met.

So, we believe that under Supreme Court decisions and relevant Fifth Circuit law that the provisions of the decree, including the affirmative hiring and promotion relief, are lawful and proper.

Now, in addressing some of the specific objections that have been raised today, first with respect to the state of the law in the Fifth Circuit, I believe that the Court has the benefit of an earlier case involving the City of Jackson, in which the Fifth Circuit approved a consent decree that contained affirmative hiring goals for blacks and women, and that case is still good law in the Fifth Circuit, and we also believe that the *City of Alexandria* case is still good law, and that the

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decision of the Fifth Circuit to rehear en banc the *City of Miami* case does not affect its holding in the *City of Alexandria* case.

Your Honor, we don't believe that it's necessary for the Court, to approve these two decrees, to have entered findings on the record of unlawful discrimination against blacks and women. However, we do note that with respect to the entry level police and fire tests, that the Court has entered specific findings of fact and conclusions of law that have been upheld on appeal with respect to that part of the litigation.

We also have presented to the Court evidence that would suggest that there was unlawful discrimination against women after 1972 in a variety of positions, including the positions in police and fire.

As the Court may recall, the City and the Personnel Board had male only designations for police officer and firefighters after March 24th, 1972, and the Personnel Board also established certain minimum height requirements, which we contended had a discriminatory effect on women.

Without going in extensively to the trial record, we believe that it contains evidence of post-1972 discrimination against both blacks and women, and that while we don't believe that it's necessary

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to have that as extensive a record for the Court to approve these decrees, we would like to simply point that out for the benefit of the objectors.

As I said in my opening remarks, with respect to the affirmative relief provisions of the decree, we don't view the decrees as incorporating racial quotas, because it does not — the decrees do not totally foreclose the hiring or promotion of blacks and women. And we believe that the case law as I referred to amply supports those provisions of the consent decrees.

Furthermore, we don't believe it's necessary for the Court to find that there is present discrimination in order to approve remedies which are designed to correct for the effects of past discrimination.

However, again we would like to point out to the Court that the subject of the two trials concerned certain testing practices and other selection practices of the Personnel Board which were used and relied upon by the City of Birmingham, which were continuing, ongoing practices, so that we believe that there is evidence of present discrimination, or at least there was at the time of the two trials in the case.

With respect to the effect of the consent

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decree on high school education requirements, we would simply like to point out to the Court that during the second trial we presented evidence of the adverse impact of that requirement on blacks. In our judgment there was no showing of validity on the part of the Personnel Board to the high school education requirement, but in any event, the parties have, in settling the litigation, have decided not to further contest the issue of validity.

And so, we think that the adjustments that are being made in this selection standard are appropriate. And moreover, there are a number of Courts that have acknowledged the propriety of eliminating high school education requirements in firefighter-type cases as a remedy for past discrimination.

THE COURT: Could you come back for a moment to the sex designation in announcements subsequent to 1972? You said that there were announcements for male only positions in the Police and Fire Departments after 1972?

MR. RITTER: That's correct, Your Honor.

THE COURT: It's been now almost a year and a half since, or about a year and a half or more since the evidence was taken. Could you refresh

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my memory on that aspect of the evidence?

MR. RITTER: We have an exhibit in the record, Your Honor, I'm not sure of the number, that contains job an-

nouncements from the Personnel Board after 1972. I would be happy to get the number of that exhibit if the Court wishes it.

THE COURT: I would like to have that. I had a recollection that the evidence as related to that matter went back maybe to 1956 or '57, and there was some question as to whether it might have been into '59 or so, but that there wasn't anything after '72.

MR. RITTER: Your Honor, that was with respect to the racial designations in the job announcements. The Personnel Board ceased including white only restrictions in its job announcements in '57, but the male only restrictions continued past 1972.

THE COURT: Well, my recollection was that there were a few positions in which there was a male only designation, either because of the position such as juvenile correction officer, or that maybe there was a dispatcher for two or three jurisdictions, although not the City of Birmingham, that might have been after '72, although was unclear about that, and that I didn't recall anything about firefighters, or generally about police officers after '72. If

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there is an exhibit, if you could call that to my attention so that I could look at it.

MR. RITTER: Your Honor, it's Plaintiff's Exhibit 9, Plaintiff's Exhibit 9 and Plaintiff's Exhibit 11. I have a listing here of the jobs, but if the Court would just prefer to look at the exhibit, we could do it that way.

THE COURT: Well, perhaps if it's a very short list —

MR. RITTER: There are about ten or eleven different jobs for which there were post-1972 sex designations, including police officer and firefighter.

THE COURT: Perhaps you can give me a copy of that after we conclude the hearing this morning.

MR. RITTER: Again, Your Honor, I wish to stress that besides this kind of evidence of discrimination we also have a

variety of statistical evidence that will show that blacks and women even today are still substantially underrepresented in a variety of departments and jobs within the City, and that that evidence in our judgment alone would be sufficient for the Court to approve this kind of voluntary settlement between the parties.

THE COURT: Well, as I view it, the Court

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is confronted with two different concepts. One is the concept that there has been evidence showing evidence, whether or not it was ultimately accepted, or would be accepted by the Court, of discrimination. That largely, however, was related to discrimination against blacks. And the position of the Court, looking at a consent decree then that deals with that kind of problem is stated in various decisions. But, then there is the other problem of some relief in the form of goals for groups, and here I'm particularly talking about women, where there has probably been very little proof in the way of discrimination, and at most a showing of under-utilization, so to speak.

It seems to me here that the Court is in a different situation in terms of evaluating the rights of the parties to create goals, where the evidence has not perhaps shown discrimination, but only a failure to have employed at a certain level women. And it seems to me there are two different problems the Court has to deal with.

MR. RITTER: Your Honor, we would view — the evidence is certainly different, but in terms of the degree of discrimination, we don't view that that discrimination against women to be any less significant

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in terms of its effect than discrimination against blacks.

And besides the two exhibits that I have referred the Court to, we also presented to the Court other exhibits showing male only restrictions in a large variety of jobs other than the ones that continued after 1972, which were in place as recently as 1967 and 1968. So, what we have presented to the Court to

date is evidence that there was a wide variety of jobs in which there were male only restrictions in place as part of the Personnel Board job announcements and we would ask the Court to look at those exhibits also.

With respect to the Guardian's objections, Your Honor, in essence it's an objection that we didn't go far enough in the consent decrees to remedy the perceived discrimination against blacks. In our judgment, we think that that decree is adequate. To the extent that the Guardians would like to have twenty-five blacks immediately promoted to Sergeant positions, while that would perhaps bring the percentage of blacks in Sergeant positions up to something roughly equivalent to parody with respect to their percentage in the labor force, we're concerned that that kind of relief would totally

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foreclose the opportunity of whites to receive promotion during this limited period of time. And that raises, of course, legal concerns for us, so that in our view the kind of race-sensitive relief contained in these two consent decrees, which does not totally foreclose the opportunity for white males to obtain hiring and promotion with the City, is the more appropriate way to go, and we think it's lawful and Constitutional.

With respect to Mr. Miller's objection, we, of course, regret that he hasn't been able to obtain a job to date in a police position with the City. As I understand it, he is still on the eligibility list, so that there is still a possibility that he will obtain employment. However, I don't believe that there's any vested right on the part of any test taker to a job. They are all in competition with others for these positions. And the Court has already found that the test that Mr. Miller took did not have predicted validity, so it did not differentiate clearly at least as between those that would be better police officers than others. And the remedy that the Court included in its 1977 order was designed to foreclose any past discrimination that the Personnel Board may have used in those tests.

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So, we think the Court was certainly appropriate. It's been upheld on appeal. So, we think the relief provided in the decree, which is simply the incorporation of the Court's 1977 order, is certainly proper.

Your Honor, I have no further comments to make at this time. We would like — if I could have just a moment to consult with counsel, there is one other matter that we may wish to bring to the Court's attention.

Your Honor, we have no further comments to make at this time.

THE COURT: Are there any comments from other counsel?

MR. WHITESIDE: The Personnel Board has no comments, Your Honor.

THE COURT: I would like to ask the Personnel Board one question.

MR. WHITESIDE: Yes, Your Honor.

THE COURT: This is really with further inquiry concerning Mr. Miller's statement.

In what he had to say, it seemingly indicated, and perhaps he was not intending to do this, that a higher percentage of blacks were being certified for police officer positions than whites, when measured as against those taking the test.

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The decree of the Court, which was affirmed in relevant part by the Fifth Circuit, had directed that no higher percentage of blacks than whites be certified out of the Personnel Board.

MR. WHITESIDE: Your Honor, the certification right now is at applicant flow rates. The applicant flow rate as of 1979 was forty-six percent black. So —

THE COURT: Well, are there more than forty-six percent of those certified blacks, to your knowledge?

MR. WHITESIDE: No. No. No.

THE COURT: Okay.

MR. WHITESIDE: Within one or two decimal points.

THE COURT: But, in general, the percentage of blacks being certified is the same as the percentage of blacks who took the test, and the same with whites?

MR. WHITESIDE: That's true. The reason he was down at seven hundred on the list is that more of the blacks were at the bottom of the list.

MS. REEVES: Just briefly, Your Honor. I represent the Martin plaintiffs, and the Martin plaintiffs urge the approval of the City of

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Birmingham and the Personnel Board decrees for the same reasons that have already been expressed.

We would also like to call to the Court's attention that in the Martin case the action was filed on January 7th, 1974, and from 1974 to 1981 represents a long period of time. Although there have been two trials, and there have been orders from the Court to some degree curing or affecting what we believe to be rampant discrimination, that this order brings to the City of Birmingham, and through the Personnel Board, brings relief now.

We have in our very brief memorandum that we cited to the Court, brought to the Court's attention a footnote in the *American Airlines Stewards* case. It says, and I would call this to the attention in the context of Mr. Thompson's objections, in the Guardians objections. It may well be that minority members of the class will have to forego the full retroactive competitive seniority provided in *Franks*, so that the majority may acquire some benefits, and yet avoid the cost and uncertainties of litigation.

Of course, we can all speculate what relief might be awarded were we to continue with litigation for years to come. In the history of this case, it has been so complex, it has been well fought, it has —

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there have been a number of appeals, and were the case not settled we could certainly expect that, based on the past track record, we could expect that for the future. And we urge that as an important consideration for the Court.

Although it may be that this relief is not as full as the Court may award, yet it is relief now, and that in itself is of importance.

It may be that the Court would order less relief than we have, but that is the nature of a consent decree. No one does know.

We would point out to the Court, in *Williams v. Bethlehem Steel*, and also *United States v. Allegheny Ludlum*, that to the extent that the conditional class order is approved, that there remains relief for people who have not been conditionally included in the class order, and that for those people they still do maintain their individual remedy and their right to file an action. They would not be prohibited by any order which the Court would approve here.

Thirdly, we would point out to the Court that these decrees are intended to operate in tandem. It was a position that was urged by the plaintiffs all through the litigation that the cases be tried

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together, and we now think that we have achieved that which is workable by having at least for the City of Birmingham and the Jefferson County Personnel Board a joint operation of a joint process.

But, also the decrees have this benefit:

The decrees have a mechanism that also allows for independence, that is to say, should one decree not be workable, or should there be violations of one decree, the other defendant does not necessarily fall, or to put it from their perspective, they don't incur further back pay or financial liability. That in itself is a factor, and we believe an important feature of a decree which the Court could enter now.

We would also say that there are numbers of defendants. In the Martin case there is only one other defendant, that is to say, Jefferson County, but we believe that an entry of the decrees here has a salutary effect on other remaining litigation, and may encourage settlement with respect to the other jurisdiction in the Martin case.

I represent to the Court that the settlement negotiations have been long and they have been difficult. The United States and the private plaintiffs at sometimes have had differing interests, and yet this decree, as the Court knows, at least

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that the settlement negotiations have been long, while not knowing the terms of those negotiations, or the proposals, we would say that the negotiations have been at arm's length, and it represents the best that we can do under the circumstances.

There is with these two decrees a total amount of back pay of three hundred thousand dollars. That is not a world of money, but we have to consider municipal defendants and public defendants, and consider the public interest and that which we can do.

For those reasons we think that the decree is fair and just and reasonable. There is in this — for the reasons and the cases cited in our memorandum, and that of the Department of Justice, we would urge the Court to enter approval of the decree. Thank you.

MR. ADAMS: The Ensley Branch has no argument, Your Honor.

MR. ALEXANDER: Your Honor, we would like to be heard very briefly.

Your Honor, the proceedings this morning seem to have instilled a legal argument focusing largely on the propriety of the remedial goals and timetables in the decrees. The City has addressed those

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arguments at some length in its brief, and I do not want to burden the Court with hearing a regurgitation of those now.

I do want to comment a little bit on the practical aspects of the posture in which we find ourselves in. As Ms. Reeves asserted, the negotiations between the City and the United States, the private plaintiffs, in parallel with the Personnel Board, have been protracted and difficult. We originally apprised the Court that they would take about six weeks. They have taken a good bit longer than that. And that that effort, that time has been devoted to trying to reach a compromise that will satisfy all parties, as well as the interest of those who are objecting to the decree.

Obviously, as a compromise, we have not satisfied each of our parties, but we think it is a reasonable accommodation, and we urge Your Honor's approval.

The *Valentine* case cited in our memorandum sets forth the criteria for the approval of race-conscious remedies. We think that that is a good summary, and one which if this Court were to adopt which would compel approval of this decree.

The goals for both women and blacks relate

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to the percentage in the civilian labor force of Jefferson County. They are subject to the availability of qualified women and blacks, and with respect to positions that require professional license or degree, they are subject to amendment to affect the availability of those persons with the requisite qualifications.

As Mr. Ritter points out, whites and males are by no means foreclosed from promotion and/or hiring during the period of the decree, although it's evidence that blacks and females will receive some special considerations, which on behalf of the City we assert they are due.

The decree is temporary in nature. It contemplates not any long term changes in the operations of the mechanics of the Personnel Board and/or the recruiting process. But —

THE COURT: Well, let me interrupt you there. By language it's temporary, but it terms of the projected period of time for various things to be accomplished, do you have any estimate about the length of time that would be involved, given the rate of employment in various positions?

MR. ALEXANDER: I think that, Your Honor, depends, will vary dramatically depending upon the

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particular position. The decree is one for limited time, and to the extent we can attain success during that period, it would expire. To the extent we are unable to do so, to meet the goals of the private plaintiffs, or the United States, presumably it is a question for additional negotiation at that time, or perhaps some petitions on their behalf.

Finally, with respect to the *Valentine* criteria, there appears both in the Firefighters and in Mr. Miller's objections to be some concern about the qualifications of firefighters and police officers in the City of Birmingham. We share that concern. By adopting this decree we do not in any respect believe that we are abdicating our prerogatives to insist that firefighters and police officers be qualified to do the jobs they are selected to do. We believe that we can retain our standards, and at the same time correct what, as the evidence before Your Honor will indicate, are obvious racial and sexual imbalances.

We have been a tag-along defendant to date, we have not been active in either of the trials. We are not as familiar as Mr. Ritter and Ms. Reeves, Mr. Whiteside with the material offered. We have had little trouble, however, in dealing with the

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question of remedial relief with respect to women, which Your Honor has isolated.

The evidence handed to Your Honor this morning will reflect that of six hundred and thirty persons who are in the Firefighting Department of the City of Birmingham, eight are women. Those women are assigned to office and clerical posi-

tions. We think that that is a matter which we by agreement are legitimately entitled to address.

Finally, as we assert in our brief, the fact that we are parties with the United States in this agreement provides to us an additional measure of protection, a presumption of validity, if you will, for the reasons that Judge Goldburg points in the footnote in the *City of Miami* case, the United States is presumably more disinterested, although not necessarily obviously, than private counsel, who may be suspect of having other considerations involved. By saying that I certainly don't impugn any parties to this litigation. But, we do think that the fact that the United States is a party to this settlement is indeed a helpful factor.

As we also indicate in our paper filed before the Court, we believe the burden is on the objectors to come forward and demonstrate either by

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legal argument or evidence why the decrees should not be put into effect.

Certainly there has been no evidence to support a variety of the assumptions in both the Firefighters and Morris objections, and for that matter the objections of the Guardians.

One final comment: If I understand the Firefighters' position, they would say that the City of Birmingham is not entitled to attempt to resolve this difficult matter absent a finding of discrimination by this Court. As Judge Thornbury indicated in his concurrence in *Miami*, that puts an extraordinary and difficult burden on the City, who is a defendant. The law is such that we must not only pay our own attorneys, which I personally don't object to, but if we lose we must also pay for the other side as well, at least for the private cases. The cost of litigation is extraordinary in these cases. And while the City of Birmingham has put forward a great deal of money over a period of time, that pales in comparison to what it could anticipate if it were in effect required to go to trial.

The Firefighters argue that Your Honor sends us back to the bargaining table. I think that this, while I'm not saying that some minor suggestions

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might not be accommodated, but I think that the compromise that is before the Court represents in many respects the limits to which the various parties were to go.

Ms. Reeves asserts that three hundred thousand dollars is not a world of money. The City of Birmingham has a very different view about that, and we think that certainly the Court is entitled to consider the fact that if the Court sends us back to the bargaining table it may well be sending us back to necessary litigation. Thank you.

THE COURT: I have a couple of questions aimed at the City. There's no provision in the City consent decree dealing with weight-height requirements comparable to that in the Personnel Board, in that the Personnel Board consent decree specifically indicates that Class A, B, and C physical standards may be imposed provided the height-weight aspects of those are disregarded. The City's consent decree simply says no height and weight requirements.

MR. ALEXANDER: — requirements which would have an adverse impact.

THE COURT: Now, I'm not sure what the distinction is, and particularly as it relates to the question of strength requirements of strength requirements for certain

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jobs, what the parties are really saying.

MR. ALEXANDER: As I interpret the City's decree, and I indicate this is strictly the City's view, that the City would not impose any height or weight requirements absent some demonstration that that had a valid job related goal, where there was an adverse impact, as I think we could probably but not necessarily expect with respect to women.

THE COURT: Well, to be more specific, do you understand that the physical standards, Class A, B, and C, as may be imposed under the Personnel Board, would relate to matters of strength, physical strength, which in turn might be utilized by the City, for example, in certain firefighting positions?

MR. ALEXANDER: I really can't answer that question, Your Honor. I am not familiar with it.

THE COURT: Perhaps the Personnel Board or the United States can respond to it.

Let me tell you the other comment or question that I have about the City consent decree, and that relates to paragraphs 10-A and 10-B. I am concerned, as was really presented in a letter from the Personnel Board, as to really what that 10-A and 10-B means specifically as it relates to the City's reserved right to go outside of certification lists.

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MR. ALEXANDER: What the City intends, and as is evident, there may be some area of disagreement among the co-defendants, is this: That it would request the Personnel Board to certify to it applicants with gender and racial preferences consistent with the goals we have stated. That's step one.

To the extent that the Personnel Board either fails or refuses to do that, then the City through its own personnel organization would recruit and seek women or blacks to meet a particular requirement. It would then send those persons to the Personnel Board and request that the Personnel Board certify them through the normal process.

THE COURT: Let me use this as an illustration: Suppose the City of Birmingham wanted two police officers, it would be unusual simply to be asking for two, but that would typically mean you would have what, five, four people certified to fill those two positions? You've got a goal for certification and for hiring of, what, fifty percent? Suppose the Personnel Board responds and gives you the names of two blacks and two whites; suppose the City finds that the two whites who were certified are demonstrably better qualified

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than the two blacks who are certified, what is your view in terms of what the City can do under this decree?

MR. ALEXANDER: I think that the City would be required over a period of time to see to it that the racial goals were met. Assuming that the demonstrable qualifications were assessed by job-related standards that cause the plaintiffs no difficulty, and further assuming that the blacks were not minimally qualified in some view of the City, then we would take the whites. We would try to balance over a period of time to get that goal.

Assuming that both the whites and the blacks were both qualified, but assuming by some standard, and it's a little bit difficult for me to put it in a factual context, but some standard the whites were perceived to be better, if the blacks were perceived minimally qualified, and we required additional blacks to meet our goals, then we would take them.

THE COURT: Suppose the blacks certified from the Personnel Board declined appointment, you selected them, they declined appointment, you've still got on my hypothetical two whites who have been certified, can you then go outside the Board and in effect directly recruit a black?

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MR. ALEXANDER: I think that we would take the position that we could recruit a black, but we would refer the black to the Personnel Board, then it would be incumbent upon the Personnel Board to determine whether recruited black or blacks met the various criteria.

THE COURT: Do you view these paragraphs as in some way giving the City the right to conclude that those certified by the Board are not in fact qualified?

MR. ALEXANDER: No different than we do now, Your Honor. The answer is yes. We think that the Personnel Board and the City look at different criteria.

THE COURT: Well, you would not attempt to utilize the provisions of paragraph 10 to give you any powers with respect to rejection of Board-certified persons that you do not already have?

MR. ALEXANDER: Yes, sir.

THE COURT: That is, by treating them as not qualified?

MR. ALEXANDER: Yes, sir.

THE COURT: Okay.

MR. ALEXANDER: I would emphasize, Your Honor, and recognizing there is some controversy about

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these provisions of the decree, as the Court is aware, I would emphasize that it's a, it's an overriding position. That's how we refer to it in our brief. And one would hope in the perfect world that we would never have to utilize it. I don't know whether that's true. I don't know whether either Mr. Whiteside or I can comment that at some later point there might be some dispute with respect to its operation in a particular case. I obviously don't think we can do that. But, the City has found itself in a position, as we say in our brief, where the recruiting practices of the Board have cost it money, if you will. That's not putting off on the Board, it's not meant to be. But, to the extent that the 10-B override provisions would prevent the City from incurring additional liability with respect to the placement of either blacks or women, we think it's a very necessary part of the decree.

THE COURT: Perhaps some counsel for the proponents in a better position to comment could address the question of strength requirement.

MR. RITTER: Your Honor, I would just like to comment briefly on that.

I don't have the Class A, Class B, and

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Class C physical requirements with me. It's my understanding that those requirements do not specifically address any strength test that may be given by individual fire departments as a selection criteria for firefighters. They are more in the nature of general medical standards for various types of jobs. Now, I could be wrong on that, and Mr. Whiteside is here to comment further on that.

I believe that if there is a strength test given by the City of Birmingham Fire Department, or by other fire departments, and if the Personnel Board is involved in the development of that test, and I'm not sure that they are, then we believe that the early paragraphs of the consent decree with the Personnel Board dealing with selection standards generally would cover that. And if it turns out that the strength test is having an adverse impact on women, then we would assume that the Board would have some evidence to show that that test is content valid, if the Board is involved in any way with those kinds of tests.

Quite frankly, Your Honor, I don't believe the parties were specifically focusing on the tests given for firefighters in negotiating those two parts of the consent decree that you have referred to.

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But, that would be my reading of the decrees, if this in fact became a problem during the operation of the decrees.

MR. WHITESIDE: May I argue, Your Honor? Your Honor, the height and weight — there is no maximum or minimum height and weight standards under the Class A, B, and C physicals, but the Class A, B, and C physical standards do eliminate certain percentiles, the extreme percentiles of both males and females, about the tail-end, if you take a bell curve, with ten percent on each end are the males and females. Their physical or their lack of physical standards are such that they may not have the strength or endurance to be able to meet some of the requirements for either police officer or firefighter, or anybody else under Class A standards.

But, we do not have a strength test as such. That is a problem. The City of Birmingham's decree and our decree do not measure in that area.

I am confident that we will be able to work it out and I don't think that will cause a problem.

It's the same thing with paragraph 10, we view paragraph 10 as an escape mechanism for the City of Birmingham in the event the Personnel Board fails to live up to the terms of its consent decree.

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We don't view it as a, I think as I stated in my letter, an end run around the Personnel Board's merit system.

THE COURT: Do you view the decrees as precluding the use of a strength test if that strength test were found to have adverse impact on women?

MR. WHITESIDE: No, I don't.

THE COURT: For a particular job?

MR. WHITESIDE: At least not under the Board's decree. Now, I don't want to speak for the City's decree, because I wasn't involved in the negotiations on that. But, there are several references in the Board's decree that allows the use of any test that has adverse impact, if it can be demonstrated to meet the requirements of the guidelines. We may have placed an additional burden. I think in some cases we have to refer to the Justice Department first on some selection devices. But, no, I do not.

THE COURT: All right. Any further comments or questions?

MR. RITTER: Your Honor, just for the benefit of the Court, I would like to refer the Court to a couple of other exhibits that we put in the record at the second trial dealing with discrimination against women, Plaintiff's Exhibit 8 and Plaintiff's

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Exhibit 148.

And also I would like to refer the Court to pages 110 to 124 of the Plaintiff's post-trial brief in the case that contains a discussion of that evidence.

THE COURT: Is there any further comment by the objectors?

MR. FITZPATRICK: If I may speak from here, sir. Mr. Ritter stated that he relied on *U. S. v. Miami* and *U. S. v. City of Jackson*. I think we have said too much about *Miami* already. As far as the *City of Jackson* goes, my reading of this case, it does indicate in a footnote that there were quotas involved in the consent decrees there, although it's apparent from a reading of the case that that was not the subject of the appeal. The question is still open.

THE COURT: All right. Before I close the hearing, is there anyone here to speak on behalf of Johnny Morris, Jesse Sprayberry, B. R. Stevens, J. R. Davis, John Dipiazo, Juanita Eaton, or Barbara Buckland, or are they here to speak on their own behalf?

The Court will take under submission the question of whether or not to approve the consent

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decrees. I will receive any supplemental brief, but would ask that it be filed by Wednesday afternoon late if at all possible. I would like to be able to deal with the question by the end of the week.

I would also suggest that a proposed, that is, a form of order be drafted by the parties if the Court should ultimately approve the decree. I say that because there are certain technical aspects of the order, among which is that it's not a final order with respect to at least one aspect of the case dealing with certain monetary liability, where there are other provisions, and because of the triggering mechanism that the entry of the judgment would have.

That also might mean, however, something on the nature of a 54(b) certification notwithstanding those other aspects.

In any event, I would ask the parties at least to get together and consider, if you've not already done so, the format of a judgment if the Court should rule in favor of the proponents of the settlement.

Insofar as the question of intervening by the Firefighters with respect to the decree, certainly you may file such a motion to intervene. It would be my expectation frankly to deny that motion for

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intervention as untimely.

The matter as it relates essentially to the Firefighters and the Firefighters exam has been going on a long time. We have even had one trial and an appeal of that decision, and that's really the core of the items that the Firefighters are complaining about. And so, I just say that while I don't foreclose you from filing the motion for intervention, it would be my view that I probably would deny it as being untimely.

MR. FITZPATRICK: I understand that, sir.

THE COURT: All right. With that then, the matter is taken under submission.

END OF PROCEEDINGS

[Certificate omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-12-S

AFFIDAVIT OF BILLY GRAY

My name is Billy Gray. I am a lieutenant in the Birmingham Fire Department. I am President of the Birmingham Firefighters Association No. 117. When the above referenced litigation was commenced in 1974, I consulted with Mr. Joseph Curtin, Director of the Personnel Board, concerning the status of the Birmingham Firefighters Association and the Firefighters in general, as far as the above referenced litigation is concerned. We expressed to the Personnel Board our concern that the interest of the firefighters and of other City employees be adequately represented in resisting the claims of the

Government and other persons in these cases. We were assured that the Personnel Board would defend these cases vigorously. Relying on the Personnel Board, the Firefighters did not petition the Court for status as parties in the litigation.

During the intervening years in which these suits have been tried and appealed, we kept in contact with the Personnel Board and assisted them by supplying pertinent data requested by them.

The proposed consent decrees which are presently before the Court are the first instance in which the interests of the Personnel Board and the Firefighters have become opposed to one another. The Firefighters desire to intervene in this action solely for the purpose of contesting the legality of the proposed consent decrees. Neither I nor the Firefighters were aware of the negotiations which were taking place between plaintiffs and defendants in these cases until the formal notice of the consent decrees was given.

This 4th day of August, 1981.

/s/ Billy Gray
Billy Gray

Subscribed and sworn to
before me this 4th day
of August, 1981.

/s/ Notary Public
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-12-S

MOTION TO INTERVENE

Pursuant to Rule 24, FRCP, BIRMINGHAM FIREFIGHTERS ASSOCIATION 117, BILLY GRAY and Tommy Sullivan petition the Court to intervene as parties in the above-captioned litigation on the side of the defendants. In support hereof, intervenors state:

1. Birmingham Firefighters Association 117 is a labor association of firefighters employed by the City of Birmingham Fire Department. It represents the interests of the majority of the presently-employed firefighters of the City of Birmingham,

negotiates on their behalf, and is duly authorized to represent the interests of the firefighters of the City of Birmingham.

2. Billy Gray is a firefighter lieutenant in the Birmingham Fire Department. Gray is a white male. He has served the currently necessary time-in-grade to take the test to become a captain in the Fire Department. He presently contemplates applying to be certified as a candidate for captain in the Fire Department. He has a material interest in having the most-qualified persons possible as his co-employees in the Fire Department.

3. Tommy Sullivan is a firefighter with the Birmingham Fire Department. Sullivan is a white male. Sullivan has built up several years seniority in the Fire Department. The provisions of the proposed Consent Decrees will materially affect the relative value of Sullivan's seniority.

4. Intervenors have material and real interests in the transactions which are the subject of this litigation. Specifically, the proposed Consent Decrees will have a material impact upon the firefighters of Birmingham in that said Decrees will materially affect the qualifications of the future co-employees of intervenors, the provisions of the Decrees will constitute discriminations against intervenors on the basis of race and sex, the Decrees will affect the potential advancement in grade of currently employed firefighters, the Decrees will materially affect the level of on-the-job safety of Birmingham firefighters, the Decrees will affect the quality of service provided to the public, and the Decrees will adversely affect substantive rights of intervenors protected by Title VII of the Civil Rights Act and the Constitution of the United States.

4. Intervenors will fairly and adequately represent the interests of currently employed Birmingham firefighters.

5. The present parties to this action do not now fairly and adequately represent the interests of intervenors. The Personnel Board formerly represented the interests of these parties. The Personnel Board's position in these cases has now become adverse to that of these parties.

6. The present disposition of this action without intervenors as parties may as a practical matter impair or impede their ability to protect their interests relating to the transactions which are the subject of this litigation.

7. Intervenors submit the Affidavit of Billy Gray in further support hereof.

WHEREFORE, your petitioners request leave to enter on the side of the defendants in the foregoing actions in order to adequately protect their interests.

/s/ W. W. Conwell
W. W. Conwell

/s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.
Attorneys for Intervenors

OF COUNSEL:

FOSTER & CONWELL
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[Certificate of Service, dated August 4, 1981, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-12-S

REPLY BRIEF OF FIREFIGHTER OBJECTORS

The Firefighters appreciate the leave granted to file this Reply. The Court appeared to be interested in reasons why certain injunctive provisions of the proposed Consent Decrees could not be agreed to by the parties. We will discuss these points first:

I. High School Education Requirement

The proposed Decrees provide for the dropping of the high school education requirement for all City employees.

Alabama Code 1975, § 36-21-46 prescribes minimum standards for applicants and appointees for any law enforcement officer position in Alabama. The education requirement is as follows:

> The applicant shall be a graduate of a high school accredited with or approved by the State Department of Education or shall be the holder of a certificate of high school equivalency issued by general educational development.

That statute alone is enough to find the provision in the Decrees illegal when there is no finding that the requirement of a degree discriminates on the basis of race and sex.

Until 1980, Code 1975, § 36-32-7 prescribed the same requirement for firefighters in Alabama. Act 809 of the 1980 Regular Session of the Alabama Legislature modified § 36-32-7 so as to require firefighters to meet the employment qualifications of the appointing authority. Although we question the validity of Act 80-809 on state constitutional grounds (inadequate title renders the Act void under Section 45 of State Constitution), we submit that the regulations of the State Department of Public Safety and City Fire Department necessitate a high school diploma requirement for the following reasons:

> 1. All City firefighters, as part of their initial training, are required to become certified as medics under the Regional Training Institute of the University of Alabama in Birmingham. The State Department of Public Safety, pursuant to Code 1975, § 22-18-1, et seq., prescribes rules and regulations concerning medics. Pursuant to state law, Emergency Medical Services Regulation 302.2 states: "All licensed personnel should have completed high school." In addition, the Emergency Medical Services program, required of all firefighters, is an accredited University of Alabama in Birmingham college level course program for which all applicants must submit a high school transcript before they will be admitted.
>
> 2. The efficient functioning of a firefighter requires certain basic knowledge to which a high school diploma is rationally and reasonably related. All firefighters must become qualified to operate the pumper system on a fire truck. The operation of this system requires the employment of complex hydraulic formulas. All firefighters must comprehend scientific gas laws. Firefighters must have a basic knowledge of chemistry in order to deal with emergency situations on the highways involving trucks carrying dangerous chemicals.
>
> 3. The hiring of persons who are not adequately equipped with basic educational skills constitutes a safety hazard to the persons who are actually hired, as well as the present firefighters.

The high school diploma requirement was not shown to have an impact upon the alleged discriminations against blacks and females in the City case. Without such a showing there is no power in this Court to amend the provisions of certain state statutes and regulations which require high school diplomas of certain City employees.

As previously stated, Code 1975, § 36-21-46 prescribes requirements for police officers. Subsection (a)(5) requires:

> (5) Character. The applicant shall be a person of good moral character and reputation. His application shall show that he has never been convicted of a felony or a misdemeanor involving either force, violence or moral turpitude and shall be accompanied by letters from three qualified voters of the area in which the applicant proposes to serve as a law enforcement officer attesting his good reputation.

It was stated above that City firefighters are required to take medic training. Medics are required to administer controlled substances during the course of their work. Code 1975, § 20-2-54 prohibits persons who have been convicted of violation of state or federal felonies from administering controlled substances.

We respectfully urge to the Court that the language in the Decrees does not reasonably conform to the strict requirements of the applicable statutes.

III. Time in Grade Requirements

Time in grade requirements are reasonably related to the need for supervisory personnel to have adequate on-the-job experience. It is submitted that the defendants' desire to drop this requirement is not the result of a desire to change their personnel policies, but instead is forced upon them under the threat of a great potential exposure under the claims of the plaintiffs. There was no showing at trial that the time in grade requirements continue to foster the alleged discriminations by the City.

IV. Quotas for Females

We again reiterate that there has been no adequate showing that the alleged discriminations conducted by the defendants discriminated against females. Without ongoing, present discrimination being shown, the injunctive relief prescribed by the Decrees is improper. *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (1977).

V. Quotas in General

We stand firm on our contentions at the August 3, 1981 hearing that the law is not settled in this Circuit concerning the power of a municipality to set hiring and promotional goals based on race and sex. The question is currently pending before the Fifth Circuit, en banc, in *U.S. v. City of Miami*, Case No. 77-1856 (submitted January 12, 1981). Without clear authority to the contrary, this Court should not permit the City and Personnel Board to discriminate on the basis of race and sex. The provisions of the decrees constitute state actions which deny the equal protection of law. We urge the Court to also consider the excellent constitutional arguments made in *Carson v. American Brands, Inc.*, 446 F.Supp. 730 (E.D. Va. 1977) and Justice Rehnquist's dissent in *Steelworkers v. Weber*, 443 U.S. 193, at 219-255 (majority opinion expressly noted case did not involve state action - unlike the instant case). What the plaintiffs ask the Court to do is indeed a landmark—they request this Court's stamp of approval on a state action which discriminates on the basis of race and sex. The firefighter objectors respectfully request the Court to refuse to do so.

These objectors have filed a Rule 24 Motion To Intervene. We feel that intervention is necessary to preserve our rights to object to the provisions of the Decrees. An appropriate brief in support of the Motion To Intervene will be supplied to the Court prior to the setting of the Motion.

These objectors appreciate the Court's consideration of their arguments.

Respectfully submitted,
/s/ W. W. Conwell
W. W. Conwell

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[Certificate of Service, dated August 5, 1981, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S and related cases CV 74-Z-0012-S CV 74-0017-S

ORDER GRANTING, IN PART, MOTION TO INTERVENE AND GRANTING INTERVENORS' APPLICATION FOR TEMPORARY RESTRAINING ORDER

The motion of Birmingham Fire Fighters Association, Birmingham Association of City Employees, Billy Gray, and Gerald L. Johnson, individually and representatively, to intervene in the above-styled causes is granted only for the limited purpose of considering the intervenors' application for a temporary restraining order. In all other respects and for all other purposes the motion to intervene is deferred by this court for later consideration.

Intervenors' motion to consolidate is deferred in whole for later consideration by this court.

As to intervenors' application for a temporary restraining order, the court concludes that there is a substantial likelihood that intervenors will be able to prove that Fred L. Plump was improperly certified by the Jefferson County Personnel Board. The court therefore concludes that it is appropriate to restrain the City of Birmingham from appointing Plump a fire lieutenant pursuant to the Board's certification until August 31, 1983, which date is acknowledgedly more than ten (10) days from the date of this Order, but to which extension the parties have agreed, understanding that no prejudice will attach as a result of the extension. Accordingly, it is hereby ORDERED that

intervenors' application for a temporary restraining order be GRANTED, pending further consideration by this court in supplemental proceedings, until August 31, 1983.

This the 5th day of August, 1983, at at [sic] 2:49 p.m. o'clock.

/s/ Sam C. Pointer, Jr.
United States District Judge

CLERK'S COURT MINUTES

United States District Court

FOR THE

NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CASE NUMBER:

UNITED STATES OF AMERICA, Plaintiff,

CV 75-P-0666-S

BIRMINGHAM FIRE FIGHTERS ASSOCIATION 117; et al, Intervening Plaintiffs,

and related cases

vs.

JEFFERSON COUNTY; et al, Defendants.

This action came on for hearing on September 14, 1983, before the Court, Honorable Sam C. Pointer, Jr., United States District Judge, presiding, and the issues having been duly heard,

It is ORDERED and ADJUDGED that pursuant to the findings of fact and conclusions of law dictated into the record by the Court, the application of the intervening plaintiffs for a temporary restraining order is denied.

FILED
SEP 15 1983
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

ENTERED
SEP 15 1983

DATED: September 14, 1983
Birmingha, , Alabama

Court Reporter: Mayra B. Malone

JAMES E. VANDEGRIFT, CLERK
BY: Linda P. Clark
DEPUTY CLERK

Supreme Court, U.S.
FILED
AUG 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1614, 87-1639, 87-1668

IN THE

Supreme Court Of The United States

October Term, 1988

JOHN W. MARTIN, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

THE PERSONNEL BOARD OF
JEFFERSON COUNTY, ALABAMA, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, *et al.*

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QUESTION PRESENTED FOR REVIEW

Whether persons affected by court-approved consent decrees containing race conscious relief can challenge those decrees in a collateral proceeding when they had notice and the opportunity to be heard before the entry of those decrees?

LIST OF PARTIES

Plaintiffs

James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Phillip H. Whitley
Marshall G. Whitson
Robert K. Wilks
David H. Woodall

Plaintiff-Intervenor

United States of America

Defendants

Richard Arrington, Jr.
Roderick Beddow, Jr.
City of Birmingham
Joseph W. Curtin
James W. Fields
Patricia Hoban-Moore
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney
The Personnel Board of Jefferson County, Alabama

Defendant-Intervenors

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas

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ON WRIT OF *CERTIORARI* TO THE UNITED STATES
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BRIEF FOR THE PETITIONERS THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, *et al.*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *In re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d 1492 (11th Cir. 1987) (Pet. App. at 3a-24a).[1] The opinion of the United States District Court for the Northern District of Alabama is reported, in part, as *In re Birmingham Reverse Discrimination Employment Litigation,* 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. Dec. 20, 1985) (Pet. App. at 27a-66a); additional findings by the district court are not reported but have been printed at pages 69a-76a of the Appendix to the Petitions for *Certiorari* and also appear at R9-1256, 57.

JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit was entered on December 15, 1987 (Pet. App. at 3a). The court of appeals denied petitions for rehearing and suggestions for rehearing en banc in an order dated January 25, 1988 (Pet. App. at 25a). Timely Petitions for *Certiorari* were filed by (i) Defendant-intervenors John W. Martin, *et al.,* No. 87-1614 on March 30, 1988, (ii) Defendant The Personnel Board of Jefferson County, Alabama, *et al.,* No. 87-1639 on March 31, 1988, and (iii) Defendant Richard Arrington, Jr., *et al.,* No. 87-1668 on April 1, 1988. The Petitions were granted and the cases consolidated by order of this Court on June 20, 1988. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

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[1]The Appendix to the Petitions for *Certiorari* is cited as "Pet. App."; the Joint Appendix is cited as "J.A."; exhibits to the 1985 trial are cited as "PX" (plaintiffs' exhibits) or "DX" (defendants' exhibits); and the record in the court of appeals is cited as "R [volume] - [document number] - [page]".

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth and Fourteenth Amendments to the Constitution of the United States and § 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), which are set forth in pertinent part at pages 1a and 2a of the Appendix to the Petitions for *Certiorari.*

STATEMENT OF THE CASE

Since its creation in 1945, the Personnel Board of Jefferson County, Alabama (the "Board") has spent one-third of the length of its existence enmeshed in this litigation concerning its employment practices. To date, this litigation has included three trials, three appeals and two petitions for *certiorari* to this Court.

The events giving rise to this labyrinth of litigation can be traced back to 1974, when a series of lawsuits were commenced against the Board and the City of Birmingham (the "City"). In January, 1974, the Ensley Branch of the NAACP, together with other named individuals, and John W. Martin, with other named plaintiffs, commenced separate actions against the Board and the City alleging that the Board and the City were engaging in employment practices discriminatory against blacks. *In re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d 1492, 1494 (11th Cir. 1987); Pet. App. 3a-4a. Thereafter, in May, 1975, the United States brought a separate "pattern and practice" suit against, among others, the Board and the City, asserting broad charges of race and sex discrimination in employment. 833 F.2d at 1494; Pet. App. 4a.

After consolidating the actions for discovery and trial, the district court judge, the Honorable Sam C. Pointer, Jr., conducted a bench trial on the limited issue of the validity of entry level tests for police and firefighters. In an opinion dated January 10, 1977, the district court concluded that the Board's actions violated Title VII, finding that the tests used by the Board had an adverse impact upon black applicants. *Ensley Branch, NAACP v. Seibels,* 13 Empl. Prac. Dec. (CCH)

¶ 11,504 (N.D. Ala. Jan. 10, 1977); J.A. 553-93. On appeal to the former Fifth Circuit Court of Appeals, the district court's finding of discrimination against the Board was affirmed. *Ensley Branch of NAACP v. Seibels,* 616 F.2d 812 (5th Cir.), *cert. denied,* 449 U.S. 1061 (1980).

A second trial was held in August, 1979, during which the validity of certain other tests and screening devices employed by the Board were at issue. After that trial, but prior to a ruling, the Board, confronted with the distinct possibility of being found guilty of discriminatory practices for a second time,[2] entered into extensive negotiations with the plaintiffs which culminated in a settlement on terms embodied in proposed consent decrees intended both to resolve the issues submitted to the district court and to govern the future employment practices of the Board and City. In June, 1981, two proposed consent decrees — one for the Board (Pet. App. 202a-35a) and the other for the City (Pet. App. 122a-201a) — were provisionally approved by the district court, subject to objections of interested persons and a fairness hearing. J.A. 694-96.

The proposed Board Decree contained a carefully constructed affirmative action plan designed to effect the integration of blacks and women into the civil service system. The Board's proposed decree generally focused upon the Board's role as administrator of the Jefferson County, Alabama merit civil service system and specifically addressed the Board's responsibility in recruiting, screening, testing and certifying applicants for hire and promotion to those jurisdictions (including the City) governed by the civil service system. Since the Board has no participation in the actual selection of individuals for hire and promotion (Pet. App. 213a) and the City has no involvement in the certification of individuals to be selected, the proposed decrees were neces-

[2]In approving the decrees' corrective measures, the district court stated "it can hardly be doubted that there is more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would be in time held liable for discrimination against blacks at higher level positions in the police and fire departments and for discrimination against women at all levels in those departments." Pet. App. 244a.

sarily interwoven to accomplish the underlying purpose of the decrees — to settle contested litigation by correcting unlawful racial and gender imbalances in the City's employment force. Under its proposed decree, the Board was to act as a conduit to afford the City a reasonable opportunity to meet the goals of the City's proposed decree by certifying sufficient numbers of qualified blacks and women for hire and promotion. Pet. App. 213a-16a.

Prior to the fairness hearing on the proposed decrees, public notice was given to all interested parties of the hearing date and the time for filing objections. *See* Pet. App. 146a-47a, 171a-92a, 222a-23a; J.A. 697-98. Objections to the proposed decrees were filed by three groups. Two of the groups, including the Birmingham Firefighters Association ("BFA"), opposed the race-conscious relief embodied in the decrees. The other group argued that the decrees did not go far enough in alleviating past discrimination against minorities.[3]

At the fairness hearing itself, the BFA and one of its members were represented by Raymond Fitzpatrick, the attorney for the white males (plaintiffs and respondents here) who later elected to collaterally attack the consent decrees. During the fairness hearing, the district court heard objections by, among others, Mr. Fitzpatrick, that the proposed consent decrees would have an adverse impact upon nonminority employees. J.A. 727-50; Pet. App. 238a-40a. Despite being afforded the opportunity to do so, Mr. Fitzpatrick presented no evidence at the hearing to support the contention that the proposed decrees would facilitate unlawful reverse discrimination. J.A. 732-40. After hearing and considering the arguments and objections to the race-conscious relief contained in the proposed decrees, the district court approved the decrees as "not inequitable, unconstitutional, or otherwise against public policy." *See*

[3]The three groups were (i) The Birmingham Firefighters Association and Billy Gray, J.A. 701-13, J.A. 728, (ii) Johnny Morris, with other named individuals, J.A. 714-16, J.A. 728, and (iii) the Guardians Association, J.A. 728. Also, an objection by an individual (James Miller) was considered by the district court. J.A. 728-29, Pet. App. 238a.

United States v. Jefferson County, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1839 (N.D. Ala. Aug. 18, 1981); Pet. App. 246a.

Rather than seeking joinder of his clients as parties prior to the fairness hearing, Mr. Fitzpatrick waited until after the conclusion of the fairness hearing to file a motion to intervene. J.A. 774-76. The motion was denied as untimely. Pet. App. 246a. Subsequently, the district court also denied requests for preliminary injunctive relief to enjoin the enforcement of the consent decrees. J.A. 49-86. On appeal, the district court's denial of intervention and preliminary injunctive relief was affirmed, *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983); J.A. 149-61, and the plaintiffs did not seek *certiorari*. In affirming the district court's denial of intervention as untimely, the court of appeals found that the BFA members "knew at early stage in the proceedings that their rights could be adversely affected. . . ." 720 F.2d at 1516; J.A. 154.

As blacks were promoted under the guidelines of the consent decrees, a series of separate lawsuits were filed by nonminorities alleging that the actions taken by the Board and the City pursuant to their respective decrees constituted unlawful reverse discrimination. Pet. App. 110a-17a; J.A. 93-100; J.A. 130-34. Those lawsuits were consolidated by order of the district court. J.A. 207, 218-19. As required by the consent decrees (Pet. App. 125a, 205a), the plaintiffs in the earlier litigation leading to the entry of the consent decrees, John W. Martin, *et al.*, intervened as defendants in the reverse discrimination litigation. J.A. 46-47; J.A. 106-08; J.A. 169-71. Although also required to defend the consent decrees it had fought so hard to place in effect, the United States later chose instead to intervene and realign with the nonminority plaintiffs in challenging promotions of minorities made pursuant to the decrees. J.A. 263-64; J.A. 324-35.

Upon completion of discovery, a trial commenced on December 16, 1985, focusing exclusively upon promotions in the Birmingham Fire and Rescue Service and the City's Engineering Department. Mr. Fitzpatrick represented the plaintiffs at trial. Aside from minor references to the Board

Decree and the Board's practices and procedures in conjunction therewith, the trial centered upon the City's personnel selection criteria and, specifically, allegations that the City was promoting blacks over demonstrably more qualified whites. Pet. App. 27a-36a, 77a-109a; J.A. 356-533. At the conclusion of the plaintiffs' case, the district court granted the Board's motion to dismiss (J.A. 28, J.A. 402-03, R9-1257, R14-272) pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, specifically finding that "the evidence presented by plaintiffs does not establish discrimination by the Board."[4] J.A. 402-03; R9-1257. After the conclusion of the trial, the district court entered rulings in favor of the remaining defendants. Pet. App. 27a-36a, 67a-68a, 77a-109a.

On appeal, the Board contended (1) that plaintiffs had not properly appealed dismissal of the Board; (2) that plaintiffs, though afforded every opportunity to do so, had presented no evidence of unlawful discrimination by the Board; and (3) that plaintiffs in any event were barred from collateral attacks on actions taken in compliance with the Board Decree. Inexplicably, the court of appeals ignored the first two arguments and, while cryptically referring to the Board merely as a "nominal party,"[5] proceeded to hold that plaintiffs, on remand, were entitled to collaterally attack actions taken pursuant to the Board Decree. *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498-1500 (11th Cir. 1987); Pet. App. 12a-19a. The court of appeals completely overlooked the finding by the district court that (irrespective of plaintiffs' standing to collaterally attack the Board Decree) the evidence failed to show unlawful discrimination by the Board. Although agreeing that the plaintiffs were not strictly bound by the decrees, Judge

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[4]Months before the trial, the district court judge stated to Mr. Fitzpatrick that his clients appeared to be making no claims of unlawful discrimination against the Board. J.A. 242. Counsel for plaintiffs did not question the judge's observation at that or any later time and, as Judge Pointer found, failed to present evidence at trial of discrimination by the Board.

[5]*In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1497 n.17 (11th Cir. 1987); Pet. App. 11a.

Anderson, in dissent, argued that plaintiffs, if successful, should be limited to prospective relief against the City. Pet. App. 21a-24a.

SUMMARY OF THE ARGUMENT

Plaintiffs, who had notice of the consent decrees and the opportunity to be heard before their entry, should not be allowed to attack the consent decrees in these collateral proceedings. Plaintiffs could have intervened as parties in the consent decree litigation in a timely manner. They failed to do so. Their failure to timely intervene bars them from now proceeding in these collateral actions.

Plaintiffs had ample notice of the proposed consent decrees. They were afforded the opportunity to be heard. The claims now the subject of these collateral lawsuits were actually presented by the BFA and were considered by the district court prior to final approval of the decrees. Plaintiffs were afforded due process and were treated fairly. They are not entitled to yet another opportunity to be heard.

Sound policy reasons support the Board's position. If collateral attacks are allowed, the usefulness of consent decrees in encouraging voluntary compliance with Title VII will be eroded. If the element of repose historically afforded by consent decrees is destroyed, the incentive of litigants and courts to approve them in the first instance will be removed, thereby frustrating the policy encouraging voluntary compliance. Further, collateral attacks conflict with settled principles of comity. They cause inconsistent results, attended by confusion and uncertainty among those subject to their terms. They undermine the authority of the court which approved the decree by encouraging persons disappointed with the relief granted to shop for a different, more favorable ruling in another forum. They waste judicial and litigant resources by causing unnecessary relitigation of matters already decided.

The court of appeals overlooked the district court's dismissal of plaintiffs' claims against the Board and its finding that plaintiffs had failed to establish unlawful discrimination by the Board. The adjudication of plaintiffs' alleged claims of

discrimination against the Board was independent of the district court's separate ruling barring collateral attacks on the decrees. Accordingly, the dismissal of plaintiffs' claims against the Board should have been affirmed, irrespective of the question of whether collateral attacks are permissible. The court of appeals thus erred in remanding the case for a trial of plaintiffs' claims against the Board. The district court tried those claims once, on the merits. Plaintiffs lost, and are not entitled to yet another trial.

ARGUMENT

THE PLAINTIFFS HAD NOTICE AND THE OPPORTUNITY TO BE HEARD BEFORE ENTRY OF THE CONSENT DECREES AND THUS SHOULD NOT BE PERMITTED TO COLLATERALLY ATTACK THE CONSENT DECREES

Plaintiffs should not be permitted to collaterally attack the consent decrees. There is nothing unfair or unlawful in precluding these plaintiffs from now seeking to undo the decrees and to hold the defendants liable for having complied with the decrees. Plaintiffs had (1) notice and (2) an opportunity to be heard prior to entry of the decrees.[6] That is all that fundamental fairness and due process require. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). Plaintiffs could have intervened before the district court's fairness hearing but deliberately chose instead to launch a belated collateral attack. They were afforded every reasonable opportunity for their day in court and are not entitled to a second chance. Most Federal courts that have considered the issue have come to the same conclusion. *See Culbreath v. Dukakis*, 630 F.2d 15, 20-23 (1st Cir. 1980); *Marino v. Ortiz*, 806 F.2d 1144, 1146-47 (2d Cir. 1986), *aff'd*, 108 S.Ct. 586 (1988); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62, 64 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *Thaggard v. City of Jackson*, 687 F.2d 66, 68 (5th Cir. 1982);

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[6]The district court specifically found that the notice given comported with due process requirements. J.A. 248a.

cert. denied sub nom. Ashley v. City of Jackson, 464 U.S. 900 (1983); *Striff v. Mason,* 47 Fair Empl. Prac. Cas. (BNA) 79, 83 (6th Cir. June 16, 1988); *Stotts v. Memphis Fire Dep't,* 679 F.2d 541, 558 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local No. 1784 v. Stotts,* 467 U.S. 561 (1984); *Dennison v. City of Los Angeles Dep't of Water & Power,* 658 F.2d 694, 696 (9th Cir. 1981).[7]

A. *Plaintiffs' Failure to Intervene in a Timely Manner Bars These Collateral Attacks*

It is well settled that persons who have notice of a lawsuit affecting their interests and elect to bypass a known opportunity to intervene may be barred from contesting the outcome in a collateral proceeding. *See, e.g., Penn-Central Merger and N&W Inclusion Cases,* 389 U.S. 486, 505-06 (1968). *See also National Wildlife Federation v. Gorsuch,* 744 F.2d 963, 968-71 (3d Cir. 1984); *Safir v. Dole,* 718 F.2d 475, 482-83 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1206 (1984); *Bergh v. State of Washington,* 535 F.2d 505, 506 (9th Cir. 1976), *cert. denied,* 429 U.S. 921 (1976).

The rule squarely applies here. At the time the consent decrees were signed, the litigation had been pending for seven years, with all the widespread publicity normally attendant to cases of such import and magnitude. Plaintiffs, most of whom were BFA members and all of whom were city employees, had notice of (1) the proposed entry of the consent decrees, (2) their right to object to entry of the decrees and (3) their opportunity to be heard at the fairness hearing. Pet. App. 146a-47a, 171a-92a, 222a-23a; J.A. 697-98. BFA members knew of the litigation long before the fairness hearing and recognized at an early stage that their rights could be adversely affected by the proposed decrees. J.A. 154-55. The same interests which form the basis of plaintiffs' collateral attack not only were voiced by the BFA and Mr. Fitzpatrick at the fairness hearing (J.A. 732-40) but

[7]Other than the Eleventh Circuit in this case, only one court of appeals — the Seventh Circuit — has allowed collateral attacks. *See Dunn v. Carey,* 808 F.2d 555 (7th Cir. 1986).

were expressly considered by the trial judge prior to entry of the decrees. Pet. App. 236a-46a. The district judge did not simply "rubber stamp" the decrees, but approved them only after carefully weighing the concerns now espoused by plaintiffs and specifically finding that the decrees provided "appropriate corrective measures reasonably commensurate with the nature and extent of the indicated discrimination." Pet. App. 244a.

It was only after the fairness hearing, however, that the BFA and two of its members sought to intervene for the first time. J.A. 774-76. Their motion, for sound reasons similar to those which operate to preclude collateral attacks, was properly denied as untimely. Pet. App. 246a.[8] Plaintiffs, as individuals, never attempted to intervene, instead relying upon the BFA and Mr. Fitzpatrick to serve as advocates of their interests. Now, years later, they persist in asserting that their objections, once considered, should be heard again in a collateral proceeding. They are wrong, as a matter of policy and basic fairness. It is, at bottom, plainly inequitable for persons with adequate notice and opportunity to be heard to languish on the periphery of litigation, waiting to contest the outcome only after the legitimate rights of others have crystallized after years of contested litigation. This Court and others have not hesitated, in analogous contexts, to reach the same conclusion. *See, e.g., Penn-Central,* 389 U.S. at 505-06 (failure to intervene may preclude later collateral attack); *National Wildlife Federation,* 744 F.2d at 969-71 (plaintiffs who failed to timely intervene were barred from a later collateral

[8]The timeliness of a motion to intervene is left to the sound discretion of the court, considering all relevant circumstances, including possible prejudice to the putative intervenor and the parties. *NAACP v. New York,* 413 U.S. 345, 366 (1973). A motion to intervene to challenge a consent decree made after the fairness hearing normally should be denied. *See Reeves v. Wilkes,* 745 F.2d 965 (11th Cir. 1985).

The court of appeals affirmed the district court's finding of untimeliness. *United States v. Jefferson County,* 720 F.2d 1511 (11th Cir. 1983). Its analysis for affirmance, while largely correct, was flawed insofar as it was intended to proceed upon the assumption that the BFA members should be allowed to attack the decrees in collateral proceedings. *Id.* at 1518. J.A. 158-159.

attack); *Safir,* 718 F.2d at 482-83 (nonparties who failed to intervene are collaterally estopped from relitigating a decided issue); *Society Hill Civic Ass'n v. Harris,* 632 F.2d 1045, 1052 (3d Cir. 1980) (failure to take advantage of right to intervene may serve to bar a collateral attack); *Adams v. Morton,* 581 F.2d 1314, 1318 (9th Cir. 1978), *cert. denied sub nom. Gros Ventre Tribe of Fort Belknap Indian Reservation, Montana v. United States,* 440 U.S. 958 (1979) (party who fails to intervene is bound by the result); *Bergh,* 535 F.2d at 507 (9th Cir. 1976) (white fisherman barred from collaterally attacking order in favor of Indian fisherman; should have sought intervention in earlier action).

Additionally, plaintiffs, to the extent, if any, that they may claim to align themselves with the BFA's participation in the consent decree litigation,[9] are in no position to assert that the denial of the BFA's motion to intervene provides an excuse for now proceeding in these collateral actions. The BFA has no one to blame but itself for waiting too late to seek intervention.[10] The same can be said of plaintiffs, who, despite notice and opportunity, failed to take available steps to assure that they, as individuals, or the BFA, as their representative, timely intervened. Plaintiffs could have been made parties, but for their own handling of the matter.

Most importantly, however, whether due process was

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[9]Plaintiffs apparently deny that they are in privity with the BFA or other nonminorities who asserted objections prior to entry of the decrees. It is clear, however, that the BFA purported to present its objections and appeared at the fairness hearing on behalf of its members and other nonminority employees of the City. J.A. 703. At the fairness hearing, the BFA and one of its members were represented by plaintiffs' present counsel. J.A. 730. The BFA stated in its objections that "[i]t is duly authorized to represent the views of the majority of city firefighters" (J.A. 701) and requested the district court to consider the interests of nonminority city employees (*See* J.A. 703). The objections voiced at the fairness hearing were the same which form the basis of this collateral attack. Pet. App. J.A. 727-50, 701-16; Pet. App. 236a-46a. In his dissent below, Judge Anderson concluded that the BFA probably is in privity with the plaintiffs here. Pet. App. 21.

[10]As the Eleventh Circuit observed in affirming the district court's denial of intervention, "BFA members, having made an apparently ill-advised decision to rely on others to advance their interests, knowing that they could be adversely affected, cannot now be heard to complain." J.A. 155.

satisfied is not determined by whether plaintiffs were actually made parties to the consent decree litigation. The controlling question is whether they were afforded the *opportunity* to be heard, and, if they desired, to intervene. *See, e.g., National Wildlife Federation,* 744 F.2d at 969 (3d Cir. 1984). The evidence is clear and compelling that plaintiffs, consistent with the requirements of due process, were afforded that opportunity.

B. *Allowing a Collateral Attack on the Consent Decrees in These Cases Would Discourage Voluntary Compliance with Title VII.*

Voluntary settlement of employment discrimination disputes is the preferred means of achieving compliance with the anti-discrimination provisions of Title VII. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974). If non-parties like the plaintiffs here are allowed to attack a consent decree outside the confines of the action in which the decree was entered, there will be little or no incentive for an employer to negotiate a settlement of alleged violations of Title VII. Instead of serving as instruments of repose, consent decrees will be transformed into easily identifiable targets of attack in potentially unending litigation. Each employment decision made pursuant to a decree could expose the employer to a separate claim challenging the decree. In turn, the well-established Congressional policy of encouraging voluntary, rather than litigated, resolutions of employment discrimination cases will be drastically eroded. *See Local No. 93, Intern. Ass'n of Firefighters v. City of Cleveland,* 478 U.S. 501, ___, 106 S.Ct. 3063, 3072 (1986); *cf. United Steelworkers v. Weber,* 443 U.S. 193, 210 (1979) (Blackmun, J., concurring) (requiring employers to make findings of their own past discrimination in order to justify affirmative action plan would place voluntary compliance in "profound jeopardy").

Clearly, a public employer has little incentive to invest its already overburdened resources in an attempt to settle such claims under the continuing supervision of the court if there is no guarantee that the negotiated decree will have a binding effect on those who had notice and the opportunity to be

heard. *See* Note, *The Consent Judgment As An Instrument of Compromise and Settlement,* 72 Harv. L. Rev. 1314, 1316-17 (1959) (giving consent decree no more effect than that accorded a contract would remove settlement incentive). Removing the element of finality of consent decrees clearly frustrates the policy of encouraging settlement of Title VII disputes. *See Thaggard,* 687 F.2d at 69.

For reasons of public policy as well as those deriving from legal precedent, the Federal courts should encourage, not inhibit, the implementation of consent decrees as a means of voluntary compliance. Logic indicates that there is less antipathy on the part of employers and the public in complying with a voluntarily negotiated, though judicially sanctioned, consent decree, than there would be in adhering to a court-ordered remedial action after trial. A voluntary plan likely will engender less resistance and ill-will on the part of the affected employers and employees than would the same remedial action made the subject of a non-consensual edict by a court. *See* Resnik, *Judging Consent,* 1987 Legal Forum 43, 70; Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform,* 1984 Duke L.J. 887, 899. Thus, voluntary consent decrees, when measured against coercive means of assuring compliance with Title VII, are especially important and effective tools in remedying the effects of unlawful discrimination. The result urged by plaintiffs, however, would destroy the unique benefits of consent decrees by stripping away the practical incentives of litigants and judges to agree to and approve them in the first place.

C. *Well Settled Principles of Comity Are Violated when Collateral Attacks Are Permitted.*

1. *Collateral Attacks Cause Inconsistent Results.*

A decision from this Court prohibiting collateral attacks on the Board and City decrees will reinforce the right of litigants and the public to reasonably rely upon judicial action "by minimizing the possibility of inconsistent decisions." *Montana v. United States,* 440 U.S. 147, 153-54 (1979).

Conversely, if it is made possible for the nonminority employees here to belatedly challenge the decrees and obtain relief for alleged discrimination against them, both the Board and the City would be subject to potentially conflicting obligations. On the one hand, the Board and the City would be bound by their decrees; on the other, one or both of them might later be precluded from engaging in conduct which they had every reason to believe would be sanctioned and protected from attack by the requirements of the decrees, as approved by the court. The anomaly in such a result is made particularly apparent by the fact that conduct not in compliance with a consent decree is punishable by contempt.[11] *Local 93,* 106 S.Ct. at 3074 n.13. *See also United States ex rel Shell Oil Co. v. Barco Corp.,* 430 F.2d 998, 999 (8th Cir. 1970). If plaintiffs are permitted to have their way, defendants could be held liable for doing what their decrees, on pain of contempt, required them to do.[12] Plainly stated, that would be "unconscionable". *See Farmers Educational & Coop. Union v. WDAY, Inc.,* 360 U.S. 525, 531 (1959) (it would "unconscionable" to hold broadcaster liable for complying with statutory "equal time" provisions).

2. *Collateral Attacks Undermine the Authority of the Court which Approved the Consent Decree.*

A consent decree is not merely a contract between the litigating parties. It has, as a fundamental attribute, the cloak of judicial approval. *Local 93,* 106 S.Ct. at 3077. *See United States v. Swift & Co.,* 286 U.S. 106, 115 (1932). Limiting the opportunity to attack decrees like those at issue here will promote the desired goals of "establishing certainty and respect for court judgments" and "making efficient use of

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[11]This attribute of a consent decree, among others, distinguishes it from a mere voluntary affirmative action plan. The court of appeals, however, ignored that and other obvious distinctions, holding that there is no reason to treat a consent decree any differently than an affirmative action plan which has not been judicially approved. Pet. App. 19a.

[12]Plaintiffs' prayers for relief included a request to enjoin the defendants from complying with the decrees. Pet. App. 115a; J.A. 98-99, J.A. 133.

judicial energy devoted to individual cases. . . ." *I.A.M. Nat. Pension Fund v. Industrial Gear Mfg. Co.*, 723 F.2d 944, 947 (D.C. Cir. 1983).

Collateral attacks of the sort which plaintiffs now seek to mount conflict with the respect which Federal district courts owe to each other. If such attacks are permitted, persons disappointed with the ruling of one district court will be free to shop elsewhere for a more favorable decision, proceeding on nothing more than the notion that the first ruling somehow was wrong. In the process, one court will be pitted against the other, resulting in unseemly and unnecessary conflict.[13] The uncertainty engendered by such conflict would erode the integrity of the judicial process, both as a matter of fact and of perception among litigants and the public. Basic tenets of comity, as well as the orderly maintenance of judicial administration, strongly militate against such results. *See, e.g., Deposit Bank v. Frankfort*, 191 U.S. 499, 510-15 (1903); *Delaware Valley Citizens' Council for Clear Air v. Pennsylvania*, 755 F.2d 38, 43-44 (3d Cir.), *cert. denied*, 474 U.S. 819 (1985).

3. *Collateral Attacks Result in Undue Relitigation.*

If granted, the relief requested by plaintiffs likely will have far-reaching effects in spawning duplicative litigation, not just in Birmingham but throughout the country. Numerous municipalities now operate under the terms of Title VII consent decrees. *See, e.g., Stotts*, 467 U.S. 561; *Thaggard*, 687 F.2d 66. If the Birmingham decrees are exposed to attack, the door will be opened for massive relitigation on a nationwide scale. Issues actually decided will be opened to reexamination, over and over again. The strain on judicial resources as well as the financial resources of litigants,

[13]Usually the collateral action will be before a different judge, which often will be just what the plaintiff had in mind. By sheer coincidence, however, the first three of the collateral proceedings filed by the reverse discrimination plaintiffs were randomly assigned to Judge Pointer. J.A. 207. Two other actions, assigned to another judge in the district, were later consolidated before Judge Pointer (J.A. 207, 218), over the objection of counsel for plaintiffs. J.A. 196-201, 208-17.

already substantial in this protracted litigation alone, could and probably will increase many fold.

This case would be an especially inappropriate starting point for so broadly expanding the burden of the Federal courts and the litigants who appear before them. The underlying consent decree litigation was long and agonizing. It focused upon a notorious chapter in Birmingham's history, characterized by systematic discrimination against blacks. The enormity of that litigation is reflected not only by time and money expended but by the magnitude of the unlawfulness which the decrees served to remedy. The decrees were entered into in complete good faith, and had the positive, cathartic effect of righting a long history of public wrongdoing. Now, the courts are being asked to revisit the issue by persons who had the opportunity to be heard in the first instance. If that is allowed, the effects will be measured not just by the depletion of tangible judicial resources. Old animosities, long thought to have been laid to rest, will surface again. These plaintiffs have no right to exact such a heavy and unnecessary toll, simply because they wish to have their objections heard and considered yet again.

D. *Plaintiffs' Discrimination Claims Against the Board Have Already Been Adjudicated in Favor of the Board.*

The court of appeals directed the district court, on remand, to try the plaintiffs' discrimination claims against the defendants. Pet. App. 17a. Apparently preoccupied with the issue of collateral attack, the court of appeals overlooked the fact that plaintiffs' claims of discrimination against the Board were adjudicated at trial and decided against plaintiffs. Specifically, at the close of plaintiffs' evidence, the Board moved for dismissal of plaintiffs' claims pursuant to Federal Rule of Civil Procedure 41(b). Judge Pointer, in open court, granted the motion, specifically finding that "the evidence presented by plaintiffs *does not establish discrimination by the Board*". R9-1257 (emphasis added). *Counsel for plaintiffs pre-*

sented no argument in opposition to the motion.[14] No complaint or objection was registered by plaintiffs that the district court had failed to afford them an adequate opportunity to present claims of discrimination against the Board. Nothing in the record below suggests that plaintiffs were foreclosed from presenting such evidence.

Remarkably, the court of appeals failed to acknowledge any of these facts. Instead, while observing in a footnote that the Board was only a "nominal" party on appeal, it proceeded to remand for trial plaintiffs' claims, including those claims attacking the Board decree. In so doing, the panel below ignored the fact that plaintiffs' claims against the Board were heard and decided, *on the merits*. The district court's finding on the claims of discrimination was made before its final order barring collateral attack on the City's decree (Pet. App. 27a) and constituted a separate, independent ground upon which the court of appeals should have affirmed dismissal of the Board. Although they were not entitled to it, plaintiffs have had their collateral attack. They lost, and have no right to be heard again.

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[14]Throughout the trial proceedings, plaintiffs exhibited little or no real interest in pressing claims of alleged discrimination against the Board. As an example, in May 1984 the district court opined, in open court and in the presence of counsel for plaintiffs, that it did not appear that plaintiffs had asserted valid claims of discrimination against the Board. J.A. 241-42. Rather than dispute the court's observation, counsel for plaintiffs merely responded that the Board should remain a party for purposes of any later appeal. J.A. 242.

Plaintiffs' lack of zeal in pursuing claims against the Board is easily understood when viewed in the context of the Board's limited role in the matters in dispute. Pursuant to its enabling legislating (J.A. 429-435) and the consent decrees, the Board merely tests and certifies applicants for hire and promotion. The actual decision to hire or pomote is left to the City and the other jurisdictions served by the Board. Pet. App. 213a. In certifying qualified blacks pursuant to its decree (Pet. App. 213a), the Board does not displace qualified whites. The certification process does not discriminate against nonminorities and no claim has been made that the testing procedures used by the Board adversely affect whites.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the decision of the court of appeals be reversed and that the case be remanded with instructions to enter judgment for the Board.

August 18, 1988.

Respectfully submitted,

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Nos. 87-1614, 87-1639, 87-1668

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

JOHN W. MARTIN, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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August 18, 1988

QUESTION PRESENTED

May persons affected by court-approved consent decrees containing race-conscious relief challenge those decrees in a collateral lawsuit when they had notice and the opportunity to be heard before the entry of those decrees?

PARTIES TO THE PROCEEDINGS BELOW

Private Plaintiffs

Robert K. Wilks
James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
Dudley L. Greenway
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Phillip H. Whitley
Marshall G. Whitson
David H. Woodall

Plaintiff-Intervenor

United States of America

City Defendants

Richard Arrington, Jr.
City of Birmingham

Personnel Board Defendants

Personnel Board of Jefferson County
Roderick Beddow, Jr.
Joseph W. Curtin
James W. Fields
Patricia Hoban-Moore
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Defendant-Intervenors (the Martin Petitioners)

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas

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1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.409 [5] (2d ed. 1984)	21
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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987). *See* Pet. App. 3a-24a.[1] The initial opinion of the district court is reported as *In re Birmingham Reverse Discrimination Employment Litigation*, 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. Dec. 20, 1985). *See* Pet. App. 27a-68a. The district court's additional findings (Pet. App. 69a-76a) are not reported.[2]

JURISDICTION

The opinion of the court of appeals was filed on December 15, 1987. Pet. App. 3a. The court of appeals denied petitions for rehearing and suggestions of rehearing in banc on January 25, 1988. Pet. App. 25a. The Petition for a Writ of *Certiorari* in No. 87-1614 was timely filed on March 30, 1988, and the Petitions for a Writ of *Certiorari* in Nos. 87-1639 and 87-1668 were timely filed on March 31 and April 1, 1988, respectively. The Petitions were granted and consolidated on June 20, 1988.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) & 2101(c).

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1 The form of citations is as follows: the Appendix to the Petitions for a Writ of *Certiorari* is cited as "Pet. App."; the Joint Appendix is cited as "J.A."; exhibits to the 1985 trial are cited as "PX" (plaintiffs' exhibit) or "DX" (defendants' exhibit); the transcript and exhibits from the 1979 trial were admitted in the 1985 trial (*see* J.A. 403-08) as DX 1979 and DX 1980 respectively and are cited as "1979 trial PX" or, for the trial transcript, "[month] 1979 tr."; and the record in the court of appeals is cited as "R[volume]-[document number]-[page]".

2 The district court's opinion and findings are found in four places in the record: the trial transcript (Pet. App. 27a-36a); Defendants Richard Arrington, Jr., the City of Birmingham and Defendant-Intervenors' Proposed Findings of Fact and Conclusions of Law (Pet. App. 37a-66a); Plaintiffs' and United States' Motion to Amend Judgment (Pet. App. 69a-74a); and the district court's January 6, 1986 order (Pet. App. 75a-76a). For the Court's convenience, Petitioners combined these findings at pages 77a to 109a of the Appendix to the Petitions for a Writ of *Certiorari*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are the Fifth and Fourteenth Amendments to the United States Constitution and § 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). They are set forth at pages 1a to 2a of the Appendix to the Petitions for a Writ of *Certiorari*.

STATEMENT OF THE CASE

Petitioners John W. Martin, *et al.* ("defendant intervenors" in this case below and the "Martin Petitioners" here), the City of Birmingham (the "City"), the Personnel Board of Jefferson County (the "Personnel Board") and the United States have been embroiled for over fourteen years in litigation concerning the City's employment practices. The litigation had its genesis in January 1974 when the Martin Petitioners commenced one of three employment discrimination actions against the City, the Personnel Board and others. After seven years of litigation that included a trial that resulted in a finding of racial discrimination in entry-level positions in the Fire and Police Departments, an appeal and a petition for a writ of *certiorari*, and after a second trial concerning promotional positions, that litigation was settled in 1981 through court-approved consent decrees providing race-conscious relief.

When, pursuant to those decrees, the City proposed to promote black employees to the positions at issue here for the first time in its history, white employees commenced these separate "reverse discrimination" actions challenging the decrees' race-conscious relief on the same grounds that the district court had considered—and rejected—before entering the order approving the decrees in 1981. The reverse discrimination litigation has continued for six more years before reaching this Court, and the claims of plaintiffs in only two City departments have been tried. The issue before this Court is ultimately whether the City can complete the process of remedying past discrimination begun with the consent decrees without being subjected to unending collateral reverse discrimination litigation.

A. Birmingham's History of Discrimination.

The consent decrees at issue here arose after years of discrimination by the City of Birmingham. That egregious history is well known to the lower federal courts[3] and to this Court.[4] Indeed, the City's practices in part led to the Civil Rights Act of 1964, including Title VII. *See* B. Schlei & P. Grossman, *Employment Discrimination Law* viii-ix (2d ed. 1983).

The consent decrees at the heart of this litigation are designed to remedy the effects of the City's discrimination in public employment. As late as 1958, the City's job announcements for positions in the classified service (which are the more desirable public service jobs) expressly said that "[a]pplicants must be white". J.A. 427-28, 398-400; J.A. 591, 403-08; *see also* J.A. 387, 389, 392; Pet. App. 39a-40a, 85a. Although, as a result of litigation, the City stopped using such job announcements in 1958 (*see Johnson*, 165 F. Supp. at 79), the discrimination continued. In the Fire Department, for example:[5]

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3 *See, e.g., Ensley Branch, NAACP v. Seibels*, 616 F.2d 812, 822 (5th Cir.) (employment examinations held to be discriminatory in the litigation leading to the consent decrees here), *cert. denied*, 449 U.S. 1061 (1980); *Armstrong v. Board of Educ.*, 333 F.2d 47 (5th Cir. 1964) (segregated public schools); *City of Birmingham v. Monk*, 185 F.2d 859 (5th Cir.) (segregated zoning for housing), *cert. denied*, 341 U.S. 940 (1950); *Johnson v. Yeilding*, 165 F. Supp. 76, 79 (N.D. Ala. 1958) (City's job announcements required applicants to be "white"); *Terry v. Elmwood Cemetery*, 307 F. Supp. 369 (N.D. Ala. 1969) (racially restricted public cemeteries); *Woods v. Florence*, No. CV 82-PT-2272-S, slip op. (N.D. Ala. Jan. 31, 1985) (statute governing Personnel Board was passed and maintained with an intent to discriminate).

4 *See Walker v. City of Birmingham*, 388 U.S. 307, 325 n.1 (1967) (Warren, C.J., dissenting) (*citing Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964), *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963), *Gober v. City of Birmingham*, 373 U.S. 374 (1963) and *In re Shuttlesworth*, 369 U.S. 35 (1962)).

5 Although the reverse discrimination cases involve most of the City's departments, the cases in the Fire and Engineering Departments were tried first and are the subject of these proceedings. Accordingly, this brief will discuss primarily the evidence of discrimination in those two departments.

- Blacks were discouraged from applying for firefighter positions. J.A. 379-81, 391-92.
- The City did not hire a black firefighter until 1968. J.A. 438, R1-27; J.A. 365-66, 390, 392; 1979 trial PX 28 at 4, J.A. 403-08.
- The City did not hire another black firefighter until 1974, although during that six-year period it hired 170 white firefighters. 1979 trial PX 1 at 121-25, J.A. 403-08; J.A. 438, R1-27.
- Entry-level examinations discriminated against black applicants. J.A. 553-89, 408-10.
- By 1976, only nine (1.4%) of the City's 630 firefighters were black. J.A. 438, R1-27.
- By 1981, only 9.3% of the firefighters were black, and "none of the 140 lieutenants, captains and battalion chiefs [was] black". Pet. App. 243a.

In the Engineering Department:

- There were no blacks in classified positions in the Engineering Department before at least 1963. J.A. 396-98, 401-02.
- Between 1965 and 1970, fewer than 5% of the classified employees were black. J.A. 444, R1-27.
- No black employee had been promoted to transitman before the late 1960s or early 1970s. J.A. 400.
- No black employee had been promoted to chief of party before the "mid or late 70's". J.A. 400-01.
- Before 1982, no black employee had been promoted to civil engineer. J.A. 109, 397-98, 401, 444, R1-27.

In the City's classified service generally, blacks occupied fewer than 1% of the positions in 1966 and no more than 25% by 1976, while more than 70% of the less desirable unclassified jobs were filled by blacks. J.A. 437, R1-27. Yet the City's civilian labor

force was 24.5% black in 1960 and 49.9% black in 1980. J.A. 436-37, R1-27.

As for the promotional positions at issue here—fire lieutenant, fire captain and civil engineer—the number of blacks remained "the inexorable zero" until nearly a year after the entry of the consent decrees in 1981. J.A. 439-40, 442-45, R1-27; J.A. 40-41, 109, 389-91, 397-98, 401; *see International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977). Several practices prevented black employees from being promoted:

- To be eligible to take promotional examinations, employees had to receive "passing" promotional potential evaluations that were subjectively graded by supervisors (*all* of whom were white), and in the Fire Department black employees received "failing" scores four times more often than did white employees. J.A. 593, 403-08; *see also* J.A. 649-56, R10-1280 to 81.
- There were also time-in-grade requirements to be eligible to take promotional examinations, but because blacks had been excluded from entry-level positions (*see* J.A. 553-89, R10-1278 to 79, 1306; Pet. App. 242a-43a), in 1979 only *one* black firefighter, compared to 361 white firefighters, met those requirements. DX 1431 (Exhibit 7), J.A. 407-08.
- Entry-level examinations in the Fire and Police Departments were held to discriminate against black applicants (J.A. 553-89, R10-1278 to 79, 1306), promotional examinations were shown by extensive evidence to have had an adverse impact on blacks, and none of the examinations has ever been shown to be job related. *See* J.A. 290-91; J.A. 594-649, R10-1280 to 81; Pet. App. 242a-43a.
- One "seniority point" was added to the examination scores of applicants for promotion for each year of their employment in *any* position in the classified service—not necessarily in the same chain for promotion—which discriminated against black employees

because they had been excluded from the classified service. *See* J.A. 434-35, R1-27; J.A. 673-79, R10-1280 to 81; 1979 trial PX 67, 1979 trial PX 147, J.A. 403-08.

B. The Litigation Leading to the Consent Decrees.

In 1974, two actions—*John W. Martin, et al. v. City of Birmingham, et al.* and *Ensley Branch, NAACP v. George Seibels, et al.*—were commenced alleging unlawful racial discrimination in employment by the City, the Personnel Board and others. In 1975, the United States commenced *United States v. Jefferson County, et al.*, alleging that the City and the Personnel Board, among others, had engaged in a pattern and practice of discrimination against blacks and women. The cases were consolidated.[6]

A trial was held in 1976 concerning only two of the many examinations at issue—the entry-level examinations for firefighter and police officer. The district court concluded that those examinations had an adverse impact on blacks and were not job related under *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975), and the court ordered the Personnel Board to certify specified ratios of black and white applicants to the City as eligible to be hired. J.A. 553-89, R10-1278 to 79, 1306.[7]

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6 City employees were very much aware of that litigation. In seeking to intervene seven years later, the president of the Birmingham Firefighters Association ("BFA") testified:

> "When the . . . litigation was commenced in 1974, I consulted with Mr. Joseph Curtin, Director of the Personnel Board, concerning the status of the Birmingham Firefighters Association and the Firefighters in general, as far as the . . . litigation is concerned. We expressed to the Personnel Board our concern that the interest of the firefighters and of the other City employees be adequately represented in resisting the claims of the Government and other persons in these cases. . . . During the intervening years in which these suits have been tried and appealed, we kept in contact with the Personnel Board and assisted them by supplying pertinent data requested by them." J.A. 772-73.

Thus, the Eleventh Circuit concluded that "BFA members . . . knew at an early stage in the proceedings that their rights could be adversely affected". J.A. 154.

7 The race-conscious relief ordered after the 1976 trial was the model for the race-conscious relief embodied in the consent decrees.

The former Fifth Circuit affirmed, and this Court denied *certiorari*. *Ensley Branch, NAACP v. Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 (N.D. Ala. Jan. 10, 1977), *aff'd in pertinent part and rev'd in part*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980).

In 1979, a second trial, lasting eight days, was held concerning promotional and certain other employment practices. At that trial, the plaintiffs (the Martin Petitioners and the United States) introduced substantial evidence of discrimination in entry-level and promotional positions. *See, e.g.*, 1979 trial PX 28 at 4; Aug. 1979 tr. at 639-40, 1979 trial DX 360; 1979 trial PX 29 at 6-7; 1979 trial PX 70 at 7; J.A. 403-08.[8]

C. The Consent Decrees.

After the 1979 trial but, before the district court announced its decision, the parties began settlement negotiations, and in 1981 the Martin Petitioners and the United States jointly entered into two proposed consent decrees—one with the City (Pet. App. 122a-201a) and the other with the Personnel Board (Pet. App. 202a-35a). The decrees together establish goals for hiring and promoting blacks and women and procedures to implement those goals.

Notice inviting "*all persons who have an interest which may be affected by the Consent Decrees*" to appear at a fairness hearing was given by publication in two local newspapers and by mail to the members of the minority and female subclasses. Pet. App. 173a, 182a (emphasis in original), 146a-47a, 222a-23a, 248a; J.A. 695, 697-98, 727-28. Several objections were filed—some arguing that the proposed race-conscious relief was unlawful (*e.g.*, J.A. 701-16), and others that the relief was not sufficient (*see* Objections Filed by and on Behalf of the Guardians Association to the Proposed Consent Decree of the Above Parties (July 14, 1981))—and the United States defended the validity of the decrees' race-conscious relief (*see* J.A. 717-26).

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8 The evidence of discrimination adduced at the 1979 trial is summarized in the United States's post-trial brief. *See* J.A. 594-693, R10-1280 to 81.

The Birmingham Firefighters Association ("BFA") and two of its members, represented by Mr. Fitzpatrick, who is counsel for the reverse discrimination plaintiffs (the Wilks Respondents here), petitioned to appear *amicus curiae* to object to the decrees. *See* J.A. 699-713. At the fairness hearing, the district court heard arguments by Mr. Fitzpatrick and others that the decrees' race-conscious relief violated Title VII and the Fourteenth Amendment. J.A. 732-40, 747-50, 770, 407-08. The court offered Mr. Fitzpatrick the opportunity to present evidence, which he declined. J.A. 732. After "review[ing] with care the provisions of the proposed settlements to which objections have been raised, as well as those portions to which no objection has been raised", the district court found that the decrees are "not inequitable, unconstitutional, or otherwise against public policy" and entered an order approving them. *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1839 (N.D. Ala. Aug. 18, 1981), *aff'd on other grounds*, 720 F.2d 1511 (11th Cir. 1983); Pet. App. 246a.

After the fairness hearing, Mr. Fitzpatrick's clients sought to intervene, but their motion was denied as untimely. J.A. 772-76; Pet. App. 246a. The court of appeals affirmed, holding that the district court did not abuse its discretion in denying that motion. *United States v. Jefferson County*, 720 F.2d 1511, 1516-19 (11th Cir. 1983); J.A. 153-60.[9]

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9 The court of appeals found "ample justification" (J.A. 159) for the district court's denial of intervention as untimely:

1. The BFA members "knew at an early stage in the proceedings that their rights could be adversely affected", and therefore they had no excuse for waiting to intervene. J.A. 154.

2. The grant of intervention would have prejudiced the existing parties because "it would have nullified these negotiations [for a settlement] with the Board and allowed a pattern of past discriminatory practices to continue". J.A. 155.

3. The BFA members would not be prejudiced because they could "institut[e] an independent Title VII suit, asserting the specific violations of their rights". J.A. 158.

4. "[T]here are no mitigating circumstances". J.A. 159.

Mr. Fitzpatrick's clients did not file a petition for a writ of *certiorari*.

D. The Reverse Discrimination Litigation.

In April 1982, pursuant to the consent decrees, the City proposed to promote black employees to fire lieutenant for the first time in its history. J.A. 40-41. Competing white applicants (all of whom were members of the BFA (R11-23-43; R13-218-3)), represented by Mr. Fitzpatrick, commenced the first of these reverse discrimination cases and sought to enjoin those promotions. Pet. App. 110a-121a; J.A. 35-36, 38-39. The application for an injunction was denied (J.A. 37, 83-86), that decision was affirmed on appeal (J.A. 160-61), and plaintiffs did not petition for a writ of *certiorari*.

Similarly, in the Engineering Department, when the City for the first time endeavored pursuant to the decrees to promote a black employee to civil engineer (J.A. 109), competing white applicants (also represented by Mr. Fitzpatrick) commenced a second reverse discrimination action and sought to enjoin that promotion. J.A. 91-100. The district court denied that motion for a preliminary injunction. J.A. 118-20.

Four more reverse discrimination actions were commenced as the City promoted more black and female employees. *See* J.A. 130-34; Complaint, *Peter J. Zannis, et al. v. Richard Arrington, Jr., et al.*, No. CV-83-AR-2680-S; Complaint, *William L. Garner v. City of Birmingham, et al.*, No. CV-82-M-1461-S; Complaint, *Johnny Howard v. City of Birmingham Public Inspection Servs.*, No. CV-83-P-3010-S. The reverse discrimination cases were, eventually, consolidated. J.A. 207, 218-19; *see also* J.A. 138-40, 144-48, 162-64, 188-93, 208-17. Additional plaintiffs have intervened as the City has continued to promote blacks and women (*see e.g.*, J.A. 172-74, 185-87, 293-94, 307-08, 314-15, 331-32), and 41 plaintiffs presently have reverse discrimination claims pending. In the cases that were tried below, plaintiffs challenged *every* promotion of a black employee to the positions at issue. *See* R13-250.

The decrees provide that:

> "*the parties* hereto agree that they *shall* individually and jointly *defend the lawfulness* of such remedial measures *in the event of challenge* by any other party to this litigation or *by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack.*" Pet. App. 125a, 205a (emphases added).

Accordingly, John W. Martin, *et al.*, party plaintiffs in the earlier litigation, intervened as defendants in these actions—over the reverse discrimination plaintiffs' vehement objections—to defend the decrees. J.A. 43-47, 52, 101-03, 106-08, 165-71, 175-78, 185-87.

The United States, also a party to the decrees, intervened or realigned in these actions as a *plaintiff* and *challenged* many of the promotions of black employees made pursuant to the decrees. J.A. 258-64, 289-92, 319-25, 329. Although the United States maintained that it was not attacking the decrees' race-conscious relief, Mr. Reynolds, the Assistant Attorney General for Civil Rights, said that in "the Birmingham decrees . . . lower courts have approved quota systems no longer lawful under [*Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984)]". *The New York Times*, June 4, 1985 at A28. The district court observed that "the United States has advanced arguments that appear contrary to its obligations under the Decree and inconsistent with the positions it pressed so vigorously in the earlier litigation" (J.A. 290), and the court of appeals dismissed its claims on the ground that "the United States is estopped from collaterally attacking the consent decrees because it is a party to them". Pet. App. 20a. Despite its promise to "defend the [decrees] . . . in the event of challenge . . . through . . . collateral attack" (Pet. App. 125a, 205a), the United States in this very Court has indicated that it supports plaintiffs' collateral attack. *See* Brief for the United States at 9-10 (May 1988).

Defendants moved to dismiss the reverse discrimination cases as impermissible collateral attacks on the consent decrees. J.A. 121-28, 220-24. Although the United States originally

joined those motions, it withdrew its motion and then, as noted above, realigned with the reverse discrimination plaintiffs. J.A. 125-26, 205-06, 258-64, 319-25. The district court denied the motions, ruling that the decrees would provide a defense to claims of discrimination for employment decisions "mandated" by the decrees, leaving for trial, *inter alia*, the issue whether the challenged promotions were indeed required by the decrees. *See* J.A. 237-39, 250-51, 280-82.

A five-day trial was held in December 1985 concerning only the promotions of black employees in the Fire and Engineering Departments. [10] The issues at trial were (1) whether the race-conscious relief in the consent decrees was lawful and (2) whether the challenged promotions were required (or "mandated") by the decrees.

To prove the validity of the decrees, defendants introduced the complete records from the 1976 trial, the 1979 trial and the 1981 fairness hearing, and adduced additional evidence of prior discrimination. [11] On the second issue, the parties adduced evidence concerning (1) the relative qualifications of plaintiffs and the persons promoted, (2) whether the criteria that plaintiffs proffered to compare qualifications comprised a nondiscriminatory selection procedure and (3) whether the information proffered by plaintiffs to compare qualifications was available to the City when it made its promotional decisions.

At the conclusion of the trial, the district court held that the reverse discrimination plaintiffs' claims were impermissible collateral attacks on the consent decrees, that the promotions at issue were required by the decrees and that the remedial relief provided by the consent decrees—including the challenged promotions—was lawful. Pet. App. 28a-29a, 61a-65a,

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10 The cases in the Police and the Streets and Sanitation Departments were stayed pending the completion of the first trial. J.A. 329.

11 *See* DX 1422, DX 1423, DX 1424, R10-1279 to 81; J.A. 727-71, DX 1976, DX 1977, DX 1978, DX 1978A, DX 1979, DX 1980, DX 1980A, J.A. 403-408; DX 2177, R9-1273 to 74, R10-1284; DX 2210, DX 2212, DX 2213, DX 2216, R10-1292 to 96, 1300 to 04; J.A. 362-63, 365-66, 379-81, 383-84, 387-92, 396-402, 427-28, 398-400; J.A. 593-694, R10-1280 to 81; J.A. 436-45, R1-27. *See also* pp. 4-6, *supra*.

78a-79a, 106a-109a. Plaintiffs timely appealed, and defendants timely cross-appealed the district court's *sua sponte* denial of attorneys' fees. [12] The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

E. The Decision Below.

A divided panel of the Eleventh Circuit reversed the district court's dismissal of the private plaintiffs' claims. The majority (Tjoflat and Henderson, J.J.) reversed the district court's ruling that collateral attacks on consent decrees were impermissible and remanded the case for the district court to try those claims. In so doing, the court of appeals overlooked that the district court had tried plaintiffs' claims of reverse discrimination and held alternatively that the decrees' race-conscious relief was lawful. *See* Pet. App. 12a-17a. [13] The panel affirmed the dismissal of the United States's claims, holding that as a party to the decrees the United States was estopped from challenging the City's actions in these collateral proceedings. Pet. App. 20a. Judge Anderson dissented, arguing that the City should not be liable for back pay but that the private plaintiffs could seek prospective relief. Pet. App. 21a-24a.

SUMMARY OF THE ARGUMENT

Persons with notice of a proposed consent decree and the opportunity to be heard before its entry should not be allowed to attack that decree later in a collateral lawsuit. Under principles set forth by this Court in *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 505-06 (1968), and followed repeatedly by the lower federal courts, such persons should be heard as intervenors when the court hears the proponents and opponents of the decrees. Their failure to avail themselves of that opportunity to be heard as intervenors does not mean that they have the opportunity to bring a later collateral lawsuit. Because due process requires notice and the *opportunity* to be heard, denying them a *second* opportunity to be heard in a collateral lawsuit is completely consistent with due process.

Plaintiffs here were given both notice and the opportunity to be heard; they have never asserted otherwise. Notice of the proposed decrees was given to "all interested persons", and that notice obviously apprised the BFA—of which all of the Fire Department plaintiffs are members—and several others of the proposed decrees because they filed timely objections to them and appeared at the fairness hearing. The fairness hearing not only provided the plaintiffs with the *opportunity* to be heard, but their interests were presented by the BFA and *were in fact heard*.

There are compelling reasons for prohibiting persons in plaintiffs' position from maintaining a collateral attack. *First*, a consent decree that has been approved by a court after a full hearing should be given more respect than a voluntary affirmative action plan. No court has passed on whether a voluntary affirmative action plan satisfies Title VII and the Equal Protection Clause. In contrast, before a consent decree goes into effect, a court has determined that it is lawful.

Second, collateral attacks violate firmly settled principles of comity. They create the risk of inconsistent judgments, as starkly demonstrated by plaintiffs' express prayer for an order enjoining defendants from "[e]nforcing or complying" with the court-ordered consent decrees. They waste judicial resources by requiring the validity of the decree to be resolved in repetitive and piecemeal fashion. And they necessarily require the second court to ignore the respect that the judgment of the first court is due.

Third, allowing collateral attacks on consent decrees would discourage the settlement of Title VII litigation. Not only would parties have little incentive to settle if their settlement could be later undone, but once the settlement is consummated the parties could not return to their pre-decree positions if the court-approved decree is later declared invalid.

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12 The court of appeals did not consider defendants' cross-appeal for attorneys' fees. If the decision of the court of appeals is reversed, defendants' cross-appeal would be ripe for decision.

13 The court of appeals denied without comment petitions for rehearing that pointed out this alternative holding. Pet. App. 25a-26a.

Nonetheless, even if the Court were to decide that collateral attacks should be allowed, plaintiffs have already had one here. The court of appeals overlooked that both plaintiffs and defendants briefed the issue of the lawfulness of the decrees' race-conscious relief, presented evidence at trial in support of their respective positions and argued that issue in closing at trial, after which the district court explicitly decided it in defendants' favor. The district court has already decided twice that the decrees are lawful—once in 1981 and again in 1985. There is nothing left for it to decide.

ARGUMENT

I. BECAUSE PLAINTIFFS WERE GIVEN NOTICE AND THE OPPORTUNITY TO BE HEARD BEFORE THE ENTRY OF THE CONSE.. DECREES, THEY SHOULD NOT BE ALLOWED TO ATTACK THE DECREES IN THESE COLLATERAL LAWSUITS.

The Martin Petitioners submit that the court of appeals erroneously held that because plaintiffs were not parties to or in privity with a party to the earlier litigation, they cannot be precluded from asserting their claims in these collateral lawsuits consistently with due process. *See* Pet. App. 12a-17a. As demonstrated below, plaintiffs were given both notice and the opportunity to be heard before the consent decrees were entered, and that is all that due process requires. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). For familiar reasons of judicial efficiency, comity and fairness, such persons should be required to act promptly in the consent decree litigation rather than allowed to bring a collateral lawsuit.

The overwhelming majority of the federal courts agree that the better rule is to preclude persons who had notice and the opportunity to be heard from attacking that decree in a collateral lawsuit. *See Marino v. Ortiz*, 806 F.2d 1144, 1146-47 (2d Cir. 1986), *aff'd*, 108 S. Ct. 586 (1988) (per curiam); *Culbreath v. Dukakis*, 630 F.2d 15, 22-23 (1st Cir. 1980); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62, 64 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *Striff v. Mason*, 849

F.2d 240, 245 (6th Cir. 1988); *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 558 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984); *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694, 696 (9th Cir. 1981). [14] *See also Thaggard v. City of Jackson*, 687 F.2d 66, 68-69 (5th Cir. 1982), *cert. denied sub nom. Ashley v. City of Jackson*, 464 U.S. 900 (1983). [15] The Seventh Circuit has split: one panel has squarely held that a "state agency's order that rectifies discrimination should no more be the basis for a Title VII suit than a consent decree entered into during a Title VII suit" (*Grann v. City of Madison*, 738 F.2d 786, 795 (7th Cir.), *cert. denied*, 469 U.S. 918 (1984)), but a second panel (without mentioning the first panel's decision) suggested that a consent decree concerning municipal facilities could be collaterally attacked (*see Dunn v. Carey*, 808 F.2d 555, 559-60 (7th Cir. 1986)).

A. Because Plaintiffs Were Given Notice and A Timely Opportunity To Intervene in the Consent Decree Litigation, Their Collateral Attack in These Cases Should Be Barred.

1. Persons with notice that a pending lawsuit may affect their rights must intervene timely rather than assert those rights in a later action.

This Court has held that persons with notice of a lawsuit affecting their interests may be bound by its results if they do

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14 *See also EEOC v. McCall Printing Corp.*, 633 F.2d 1232, 1237 (6th Cir. 1980); *Black and White Children of the Pontiac School Sys. v. School Dist.*, 464 F.2d 1030 (6th Cir. 1972) (per curiam) ("*Black and White School Children*"); *Burns v. Board of School Comm'rs*, 437 F.2d 1143, 1144 (7th Cir. 1971) (per curiam); *Prate v. Freedman*, 430 F. Supp. 1373, 1375 (W.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *O'Burn v. Shapp*, 70 F.R.D. 549, 552-53 (E.D. Pa.), *aff'd mem.*, 546 F.2d 417 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977); *Freeze v. ARO, Inc.*, 503 F. Supp. 1045, 1047-48 (E.D. Tenn. 1980); *Jefferson v. Connors Steel Co.*, 25 Empl. Prac. Dec. (CCH) ¶31,602 at 19,486 (N.D. Ala. Jan. 19, 1981); *Austin v. County of Dekalb*, 572 F. Supp. 479, 481 (N.D. Ga. 1983).

15 Although the Fifth Circuit has suggested that the *Thaggard* line of cases should be reexamined if under the facts of a particular case a person is denied his day in court, that court remains "firmly bound" to the *Thaggard* rule where, as here, an opportunity to be heard was available. *See Corley v. Jackson Police Dep't*, 755 F.2d 1207, 1210 (5th Cir. 1985).

not intervene to defend those interests. In *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486 (1968), the Borough of Moosic brought an action in the Middle District of Pennsylvania seeking to enjoin the Penn-Central merger, one of several such actions filed in various district courts nationwide. All of the actions were stayed pending disposition of the common issues by a three-judge panel in the Southern District of New York. The Southern District approved the merger, and this Court substantially affirmed that judgment. This Court then held that, although Moosic was not a party to the New York proceedings, it was precluded from relitigating the merits of the approval of the merger in its Pennsylvania action because it "had an adequate opportunity to join in the [New York] litigation". *Id.* at 505. The Court stated:

> "All parties with standing to challenge the Commission's action might have joined in the New York proceedings. In these circumstances, it necessarily follows that the decision of the New York court . . . precludes further judicial review or adjudication of the issues upon which it passes." *Id.* at 505-06 (footnote omitted).

The Court also noted that Moosic's claims "were all the subject of extensive evidence and were analyzed at length" by the Interstate Commerce Commission (*id.* at 504), just as plaintiffs' challenges here were presented by the BFA and analyzed by the district court (*see* J.A. 699-713; Pet. App. 246a).

Similarly, in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 107 (1968), the Court rejected the argument that a necessary party has a "substantive right" to be joined or to have the suit dismissed in its absence. The Court suggested that in a subsequent suit, that party "should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene." *Id.* at 114.

The lower Federal courts hav repeatedly and consistently followed the reasoning of *Penn-Central* and *Provident Tradesmens Bank*. In a wide variety of contexts, those courts have refused to permit a person who could have intervened in

the original lawsuit to challenge the resultant relief in a collateral lawsuit. [16]

When a nonparty has not been given notice or the opportunity to intervene and was not adequately represented, members of this Court have expressed concern about precluding that person from challenging a consent decree. *See Ashley v. City of Jackson*, 464 U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from the denial of *certiorari*). In *Ashley*, the "USA consent decree between the City and the United States was agreed to the same day suit was filed, thus pre-decree intervention was impossible." Ashley's Petition for Rehearing at 6, *Ashley v. City of Jackson*, No. 82-1390 (Nov. 5, 1983). There, the court entered the decree three days after the lawsuit was commenced without notice to nonparties or a hearing. Under such circumstances, *not present here*, that nonparty

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16 *See, e.g., Bergh v. Washington*, 535 F.2d 505, 507 (9th Cir.) (Kennedy, J.) (comity and lack of standing prevent white fishermen from attacking an order in another action favoring Indian fishermen; the proper course would have been to seek intervention in the first action), *cert. denied*, 429 U.S. 921 (1976); *Safir v. Dole*, 718 F.2d 475, 482-83 (D.C. Cir. 1983) (Scalia, J.) (nonparties are collaterally estopped from challenging an issue litigated in an earlier suit where, despite the court's invitations, they "sedulously abstained" from intervening), *cert. denied*, 467 U.S. 1206 (1984); *National Wildlife Fed'n v. Gorsuch*, 744 F.2d 963, 969-70 (3d Cir. 1984) (where nonparties' attempted intervention was untimely and their interests were adequately represented, they were precluded from relitigating an environmental consent decree); *Grann v. City of Madison*, 738 F.2d at 794-96 (failure to intervene in state agency gender discrimination hearing bars male detectives' subsequent attack on the resulting relief); *Cummins Diesel Michigan, Inc. v. The Falcon*, 305 F.2d 721, 723 (7th Cir. 1962) (failure to intervene in admiralty actions binds a nonparty); *Marine Power & Equip. Co. v. United States*, 594 F. Supp. 997, 1003 (D.D.C. 1984) ("a party that fails to intervene in an action directly challenging its interests may be barred from bringing a later collateral attack" (citations omitted)); *Treasure Salvors, Inc. v. Unidentified Wreck*, 459 F. Supp. 507, 514 (S.D. Fla. 1978) ("A party who purposely fails to intervene is bound under the law of this Circuit"), *aff'd on other grounds sub nom. Florida Dep't of State v. Treasure Salvors, Inc.*, 621 F.2d 1340 (5th Cir. 1980), *aff'd in part and rev'd in part on other grounds*, 458 U.S. 670 (1982). *Accord* F. James & G. Hazard, *Civil Procedure* § 11.31 at 599 (2d ed. 1977) ("The process of settling legal rights through adjudication is simply another form of . . . investment, whose value a bystander with knowledge should not be allowed to destroy by his silence and inaction"). *See also* Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 Colum. L. Rev. 1551 (1979).

should have a post-decree opportunity to challenge the consent decree, but even then a collateral attack is not the appropriate procedural device. Rather, at least where the district court has retained jurisdiction, the nonparty should seek to intervene. *See Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045, 1052 (3d Cir. 1980) ("intervention is a far better course than subsequent collateral attack, if intervention is feasible and . . . an unjustified or unreasonable failure to intervene can serve to bar a later collateral attack"); *United States v. Allegheny-Ludlum Indus.*, 63 F.R.D. 1, 4-5 (N.D. Ala. 1974) (Pointer, J.) (allowing post-decree intervention to challenge specific provisions of a consent decree), *aff'd*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *EEOC v. American Tel. & Tel.*, 506 F.2d 735, 741-42 (3d Cir. 1974). [17]

2. Plaintiffs could have intervened timely to challenge the relief in the proposed consent decrees, but they did not do so.

Plaintiffs have already had their opportunity for a day in court, but they did not fully avail themselves of it. By 1981, the first litigation had been ongoing for years, and the BFA—which represents all of the Fire Department plaintiffs (R11-23-43; R13-218-3)—consulted with and assisted the Personnel Board to ensure that firefighters' interests were represented in that litigation. J.A. 772-73. At the time the decrees were proposed, all of the plaintiffs were employed by the City. *See* J.A. 366-67, 369-71, 377, 382, 384-87, 389-90, 396. They were given notice of the proposed consent decrees (J.A. 695, 697-98, 727-28; Pet. App. 146a, 171a-75a, 222a-23a, 248a), which sufficiently apprised several groups representing nonminority employees to object to the proposed decrees. *See* J.A. 699-716. They were given the opportunity to be heard at the fairness hearing; indeed, the BFA *was* heard as the representative of its members, including the Fire Department plaintiffs. *See* J.A. 699-713, 730, 732-40, 770. But plaintiffs did not seek to intervene prior to the court's consideration of the decrees. [18]

17 That is not to say that every motion to intervene should be granted automatically. The movant must demonstrate at the least that its interests were not adequately represented previously in the litigation. Fed. R. Civ. P. 24(a)(2). Moreover, persons who were given notice and could have intervened earlier—like the BFA here—should not be granted post-decree intervention to challenge the decree's validity. *See* J.A. 772-76; Pet. App. 246a.

If plaintiffs had sought to intervene for the purpose of challenging the relief in the proposed consent decrees in a timely fashion, that application should have been granted. *See Howard v. McLucas*, 782 F.2d 956, 959-60 (11th Cir. 1986) (abuse of discretion to deny intervention before the fairness hearing); *Kirkland v. New York Dep't of Correctional Servs.*, 711 F.2d 1117, 1125-26 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). Indeed, when the BFA and others later sought to challenge specific proposed promotions of black employees pursuant to the decrees, Judge Pointer allowed them to intervene *in the consent decree litigation* for the purpose of challenging those promotions. *See* J.A. 782-84; *see also Allegheny-Ludlum Indus.*, 63 F.R.D. at 4-5.

18 The BFA did seek to intervene, but it waited until after the deadline for interested persons to file their briefs had passed, after the objectors had filed their briefs and the parties to the decrees had filed their responses, after the court had invited persons at the fairness hearing to present evidence (J.A. 732) and after the district court heard arguments in favor of and in opposition to the proposed decrees. *See* J.A. 727-76. That motion was properly denied as untimely. Pet. App. 246a; J.A. 154-59.

Once the validity of a proposed consent decree has been submitted for decision, a later motion to intervene to challenge the validity of the decree by nonparties who were given notice and could have intervened earlier should be denied. The policies against allowing late intervention—prejudice to the parties, judicial efficiency and finality—are the same policies that militate against collateral attacks. *See, e.g., United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 596 (2d Cir. 1986); *Pennsylvania v. Rizzo*, 530 F.2d 501, 506-07 (3d Cir. 1976); *Nevilles v. EEOC*, 511 F.2d 303, 305-06 (8th Cir. 1975) (per curiam); *Firebird Soc'y of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs*, 66 F.R.D. 457, 464-66 (D. Conn.), *aff'd mem.*, 515 F.2d 504 (2d Cir.), *cert. denied*, 423 U.S. 867 (1975). That is particularly true where, as here, the person seeking to intervene has not shown any new facts or law warranting reconsideration of the challenged order.

B. There Are Compelling Reasons for Barring Collateral Attacks by Persons Who Were Given Notice and the Opportunity To Be Heard.

As demonstrated above, nonparties who may be affected by a proposed consent decree should be required to act promptly and intervene if they wish to be heard rather than allowed to maintain a collateral lawsuit. The reasons for that rule are compelling.

1. The consent decrees here were approved only after careful judicial scrutiny and therefore should not be treated as just a voluntary affirmative action plan.

To permit collateral attacks on these consent decrees is to treat them as nothing more than a voluntary affirmative action plan. The court of appeals did precisely that, concluding "[w]e perceive no reason for treating a consent decree entered pursuant to a voluntary settlement differently from a voluntary affirmative action plan". Pet. App. 19a (footnote omitted). The court of appeals treated the decrees as a private consensual agreement, notwithstanding that before the district court approved the decrees:

- race-conscious relief had already been ordered for entry-level positions in the Police and Fire Departments after the 1976 trial (J.A. 588-89), and after the 1979 trial there was "more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would be in time held liable for discrimination against blacks at higher level positions in the police and fire departments" (Pet. App. 244a);
- notice of the proposed decrees was given to "*all persons who have an interest which may be affected by the Consent Decrees*" (Pet. App. 173a, 182a (emphasis in original), 146a, 171a-75a, 222a-23a, 248a; J.A. 695, 697-98, 727-28);
- the district court held a fairness hearing at which several employees appeared and filed briefs, some arguing that the race-conscious relief was inadequate,

and others (including the BFA) arguing that it was unlawful reverse discrimination (*see* J.A. 699-771); and

- it "reviewed with care the provisions of the proposed settlements to which objections have been raised, as well as those portions to which no objection has been raised". Pet. App. 246a.

In short, the district court followed the admonition of the former Fifth Circuit and carefully scrutinized the proposed decrees. *See United States v. City of Miami*, 664 F.2d 435, 440-41 (Former 5th Cir. 1981) (en banc) (opinion of Rubin, J.). The order approving these decrees is a full adjudication of their lawfulness. *See* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.409[5] at 326 (2d ed. 1984). The decrees here are far more than "a contract between parties, formalized by the signature of a judge". *Ashley*, 464 U.S. at 902.

The decrees are very different from a voluntary affirmative action plan. Unlike the consent decrees here, a voluntary plan has not been scrutinized by a court before going into effect, and persons affected by it have not had the opportunity to present their views to a court of law. The fact that the order approving the decrees has been fully litigated, affording procedural guarantees to participants and to interested persons, entitles that order to far more preclusive effect than a voluntary affirmative action plan.

2. Allowing collateral attacks on consent decrees would discourage the settlement of Title VII claims.

Permitting collateral attacks by persons who chose not to be heard before the entry of the decrees would have the perverse effect of destroying the incentives to settle Title VII claims. *See Dennison*, 658 F.2d at 696; *Thaggard*, 687 F.2d at 69. This Court has recognized that "[c]ooperation and voluntary compliance were selected as the preferred means for achieving" equal employment opportunity. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *see also Carson v. American Brands, Inc.*, 450 U.S. 79, 88-89 & n.14 (1981); *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3072 (1986) ("*Local 93*"); 29 C.F.R. § 1608.1(b) (1986) (EEOC Af-

firmative Action Guidelines). That policy would be thwarted if collateral attacks were allowed.

Collateral lawsuits threaten the primary benefit that each party receives by settling—relief for plaintiffs and repose for defendants. In this case, the Martin Petitioners, after litigating for seven years, surrendered their discrimination claims in return for the relief set forth in the decrees. Yet they have had to fight for seven more years to defend that relief. [19] Similarly, the City has faced unending litigation rather than the repose that it had expected. Few future litigants would give up their claims or defenses if the benefits they would obtain were so ephemeral.

The incentive to settle would be diminished even further because once the parties have acted in reliance on the decree, they could not return to their pre-decree positions if the decree is later declared invalid. The original plaintiffs (like the Martin Petitioners here) would have given up their claims long before; the defendant employer (like the City and the Personnel Board) would have given up its defenses, made employment decisions in reliance on the decree and (perhaps) paid a monetary settlement. Litigants would quickly recognize that settlement would pose at least as many risks as litigating.

3. Collateral attacks on litigated consent decrees violate settled principles of comity and fail to accord due respect to federal court judgments.

Collateral attacks on consent decrees that have been carefully reviewed and approved by a federal court necessarily require reconsideration of earlier decisions, perhaps by a different judge or even by a different court. That violates the same principles of comity that led this Court to prevent a nonparty who directed earlier litigation from relitigating the resulting judgment:

19 Indeed, plaintiffs vigorously sought to prevent the Martin Petitioners from intervening in this litigation to defend the relief. *See* J.A. 175-78.

> "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent judgments." *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

The Ninth Circuit recognized these principles when it barred a collateral attack on a litigated judgment: "[t]he proper exercise of restraint in the name of comity keeps to a minimum the conflicts between courts administering the same law, conserves judicial time and expense, and has a salutory effect upon the prompt and efficient administration of justice." *Bergh*, 535 F.2d at 507 (Kennedy, J.) (quoting *Brittingham v. Commissioner*, 451 F.2d 315, 318 (5th Cir. 1971)). Those same considerations of comity require the same rule to apply here.

a. Collateral attacks violate the respect that courts accord to prior judgments.

In this case, the collateral attacks were before Judge Pointer, the judge who approved the consent decrees. That was, however, purely fortuitous. Two of the reverse discrimination cases were assigned to another judge, who denied repeated motions to transfer them or to consolidate them with the cases before Judge Pointer. J.A. 138-40, 144-48, 162-64, 188-93, 196-201; *see also* J.A. 208-17. It was only because the first-filed reverse discrimination case happened to be randomly assigned to Judge Pointer that, when the cases were ultimately consolidated, they were all assigned to him. *See* J.A. 207, 218-19.

Many other litigants defending collateral attacks have not been so fortunate. A plaintiff challenging a consent decree obviously would prefer to avoid the court that entered the order approving that decree, just as plaintiffs here fought so vigorously to keep these cases from Judge Pointer. *See* J.A. 196-201, 208-17. Therefore, collateral attacks have often been brought in a court other than the one that entered the original judgment. *See, e.g., Gregory-Portland Indep. School Dist. v. Texas Educ. Agency*, 576 F.2d 81 (5th Cir. 1978), *cert. denied*, 440 U.S.

947 (1979); *Goins*, 657 F.2d 62; *Black and White School Children*, 464 F.2d 1030; *Feller v. Brock*, 802 F.2d 722 (4th Cir. 1986); *Common Cause v. Judicial Ethics Comm.*, 473 F. Supp. 1251, 1253-54 (D.D.C. 1979). [20] Many consent decrees cover an employer's practices nationwide, [21] and if collateral attacks were allowed, a person unhappy with one of those decrees could challenge it in any other district court in the country.

A collateral attack in another forum on the decree of a court of competent jurisdiction has long been held improper because it violates the respect that federal courts owe to each others' orders. A court of equity retains continuing jurisdiction over the enforcement of its orders (*System Fed'n v. Wright*, 364 U.S. 642, 646-48 (1961); *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932)) and the power to modify its decrees based on changed circumstances of law or fact (*id.*). Courts therefore refrain from reconsidering orders by other federal courts. *See Deposit Bank v. Frankfort*, 191 U.S. 499, 510-12 (1903); *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 755 F.2d 38, 42-44, 46 (3d Cir.), *cert. denied*, 474 U.S. 819 (1985). The specter of different district courts wrestling over the fate of the same school children in a

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20 For example, in *Gregory-Portland*, the United States brought a school desegregation action in the *Eastern* District of Texas against the Texas Education Agency ("TEA"). The district court enjoined the TEA from funding or accrediting school districts that discriminated on the basis of race. *See United States v. Texas*, 330 F. Supp. 235 (E.D. Tex.), *aff'd and modified*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972). Gregory-Portland sued the TEA in the *Southern* District of Texas alleging that the threat to terminate Gregory-Portland's accreditation violated due process. The Southern District agreed, and enjoined the TEA from suspending Gregory-Portland's accreditation or funding. The Fifth Circuit reversed on the ground that the Southern District should not interfere with the order of another court with continuing jurisdiction. *See Gregory-Portland*, 576 F.2d at 83.

21 *See, e.g., United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826 (5th Cir. 1975) (consent decree covering nationwide practices in the steel industry), *cert. denied*, 425 U.S. 944 (1976); *EEOC v. American Tel. & Tel.*, 556 F.2d 167 (3d Cir. 1977) (consent decree covering nationwide employment practices of the Bell companies), *cert. denied*, 438 U.S. 915 (1978).

busing controversy, reviewing a school district's efforts to desegregate or issuing orders concerning an employer's promotion policies are precisely the types of dilemmas that comity is designed to avoid. *See, e.g., Black and White School Children*, 464 F.2d 1030; *Gregory-Portland*, 576 F.2d 81; *Goins*, 657 F.2d 62. The rule prohibiting collateral attacks is the mechanism for enforcing comity.

Comity precludes lawsuits challenging the orders of other courts regardless of whether the plaintiff in the collateral suit was a party or privy to the initial action. *See Treadway v. Academy of Motion Picture Arts & Sciences*, 783 F.2d 1418, 1421-22 (9th Cir. 1986); *Goins*, 657 F.2d at 64; *Gregory-Portland*, 576 F.2d at 82-83; *Feller*, 802 F.2d at 728-29. For example, in *Feller*, the NAACP brought an action in the District of Columbia challenging the Department of Labor's ("DOL") administration of the Temporary Foreign Worker Program. Under that program, the DOL certified that employers could hire alien workers, provided that the employers paid a specified wage. The NAACP alleged that the DOL had certified employers who paid aliens less than that wage. The district court enjoined the DOL from certifying non-complying employers, and, pursuant to that order, the DOL refused to certify two West Virginia apple growers. Those two growers sued the DOL in West Virginia and obtained an order that they be certified, with which the DOL complied. The Fourth Circuit reversed the West Virginia court's order, noting that comity "has been expanded . . . to cases in which the plaintiff in the second action was neither a party nor the successor-in-interest of a party in the first action". *Id.* at 728; *see also Exxon Corp. v. Department of Energy*, 594 F. Supp. 84, 89-91 (D. Del. 1984).

These concerns for comity are not obviated by transferring the collateral attack to the same court and judge that entered the consent decree. Because the collateral attack is a separate lawsuit, it still requires the reconsideration of an earlier order entered in another case. Allowing plaintiffs to maintain a collateral attack rather than requiring them to intervene in the original litigation means that they may effectively seek to overturn an order without first making any showing that would warrant reconsideration of that order. That is precisely what the

plaintiffs are doing here: they are challenging in these collateral lawsuits the order approving the decrees without pleading any facts or law that the district court has not already considered. Moreover, the policies of judicial efficiency and finality that underlie comity are frustrated by a collateral attack, regardless of whether the same judge presides over the second lawsuit.

b. The collateral attacks here create the risk that the City would be subject to inconsistent obligations.

This Court recognized in *Local 93* that allowing a court other than the one that entered the decree to interpret it or modify it would create a "risk of inconsistent or conflicting obligations". 106 S. Ct. at 3076 n.13; *see also Montana v. United States*, 440 U.S. at 153-54; *Thaggard*, 687 F.2d at 68; *O'Burn*, 70 F.R.D. at 552; *Dennison*, 658 F.2d at 695. That risk is very real in collateral proceedings.

A consent decree, like any other court order, can be enforced by contempt. *Local 93*, 106 S. Ct. at 3074; *see, e.g., Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1097-98 (3d Cir. 1987); *United States v. Barco Corp.*, 430 F.2d 998, 999 (8th Cir. 1970). The City could not defy the court-ordered decrees and later defend against contempt by arguing that the decrees were unlawful. *See Walker v. City of Birmingham*, 388 U.S. 307, 315-21 (1967).

In their complaints, plaintiffs expressly seek to enjoin defendants from "[e]nforcing or complying with" the court-ordered consent decrees. Pet. App. 115a; J.A. 98; *see also* J.A. 133. When the City proposed to promote black employees pursuant to the decrees for the first time to fire lieutenant and civil engineer, plaintiffs sought a temporary restraining order enjoining defendants from "enforcing" the decrees. J.A. 35-36, 38-39, 91-92. If the City were to fail to enforce and comply with the decrees, the Martin Petitioners would seek to hold the City in contempt in the consent decree case. One cannot imagine a greater risk of inconsistent obligations than allowing a plaintiff to seek in a new proceeding an order prohibiting the

defendant from "enforcing or complying with" a court order in another proceeding.

The City should not have to face that possibility. In an analogous situation, this Court rejected the argument that a broadcaster may be held liable for complying with the Communications Act's equal time provisions, concluding that such an argument "would sanction the *unconscionable* result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee." *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 531 (1959) (emphasis added); *see also National Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940) (courts cannot enter orders inconsistent with an NLRB order); 29 C.F.R. § 1608.8 (1986) ("actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII"); *Adams v. Morton*, 581 F.2d 1314, 1318 (9th Cir. 1978) (consent decree cannot form basis of a Title VII action), *cert. denied*, 440 U.S. 958 (1979). [22] Allowing the City to face liability for complying with the consent decrees here would be no less unconscionable.

c. Collateral attacks waste judicial resources by relitigating issues already decided after a full and fair opportunity for all parties to be heard.

Judicial resources are increasingly scarce (*see Schmieder v. Hall*, 545 F.2d 768, 771 (2d Cir. 1976), *cert. denied*, 430 U.S. 955 (1977)), and allowing collateral lawsuits by persons who could have intervened unnecessarily wastes those precious resources. *See Montana v. United States*, 440 U.S. at 153-54 (prohibiting relitigation of issues by persons not nominal parties "conserves judicial resources"); *Local 93*, 106 S. Ct. at 3076 n.13 (channeling litigation concerning a consent decree to the court that entered it "avoid[s] the waste of resour-

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22 Judge Anderson dissented from the decision below on the ground that the City should not be liable for back pay for complying with a court order. *See* Pet. App. 21a-24a. His analysis falters because he stated that the plaintiffs should be allowed to attack the decrees prospectively. That would still expose the City to conflicting court orders if the court in the collateral lawsuits ordered the City not to comply with the court-ordered decrees.

ces" (citation omitted)); *University of Tennessee v. Elliott*, 106 S. Ct. 3220, 3226 (1986) (giving preclusive effect to factfinding by state administrative agencies serves "the public's interest in conserving judicial resources"); *cf. Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971) (relitigation of issues "is an arguable misallocation of resources").

Here, the BFA and others objected to the decrees in the consent decree litigation on the same grounds raised by the reverse discrimination plaintiffs in this litigation. [23] The district court approved the decrees only after it "reviewed with care" those objections. Pet. App. 246a. In holding that plaintiffs' collateral attacks may go forward, the court of appeals remanded the case for the district court to decide the question that it had already decided when it approved the decrees. And because nearly every promotion of a black employee pursuant to the decrees has led to a new reverse discrimination claim, the district court will—if the decision of the court of appeals is not reversed—have to decide that same question again and again.

d. Allowing collateral attacks on consent decrees is inconsistent with the finality accorded to fully litigated judgments.

A judgment entered after a fully litigated proceeding cannot be collaterally attacked by persons who could have intervened in that proceeding. *Penn-Central Merger and N&W*

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23 In both 1981 and in these reverse discrimination cases, Mr. Fitzpatrick argued that the decrees' race-conscious relief violated Title VII because (1) it benefitted persons other than identified victims of discrimination (*compare* J.A. 704, 706-07, 709-11, 735-36 *with* J.A. 411, 413), (2) it was not supported by judicial findings of discrimination (*compare* J.A. 703-04, 707, 711-12, 735 *with* J.A. 411-13), (3) the percentage goals trammeled the rights of whites by reducing their opportunities for promotions (*compare* J.A. 702, 704, 711-12, 736-37 *with* Pet. App. 113a-15a, J.A. 97-98, 114, 132-33, 413) and (4) the decrees trammeled the rights of white employees who were allegedly better qualified than the black employees who were promoted (*compare* J.A. 702, 704, 738, 775 *with* Pet. App. 112a-14a, J.A. 71-72, 96-98, 112-13, 132, 414-16). *See also* J.A. 714-16, 747-50 (objections by other white employees); Pet. App. 236a-49a (opinion and order approving decrees).

Inclusion Cases, 389 U.S. at 505-06; *Bergh*, 535 F.2d 505; *Safir*, 718 F.2d at 482-83; *Feller*, 802 F.2d at 728-29; *Gregory-Portland*, 576 F.2d at 83. When a court has held a hearing and invited interested persons to present their views, there is no reason to treat the order approving a consent decree any differently than a fully litigated order. As the Third Circuit observed:

> "When a consent decree's essential features are attacked on the basis of facts which existed before entry or contentions based on legal doctrine then applicable, the challenge stands on the same basis as one employing similar grounds in an adjudicated case. In both instances, considerations of finality are dominant." *Gorsuch*, 744 F.2d at 968.

Several courts have observed that, if collateral attacks on consent decrees were allowed, "courts could never enter a judgment in a lawsuit with the assurance that the judgment was a final and conclusive determination of the underlying dispute". *O'Burn*, 70 F.R.D. at 552; *see Thaggard*, 687 F.2d at 69; *Prate*, 430 F. Supp. at 1375. [24]

These cases illustrate that an order approving a consent decree should be accorded the same finality as a litigated order. There are two court orders providing race-conscious relief—the 1977 order for entry-level positions in the Police and Fire Departments entered after a trial and the 1981 order approving the consent decrees. J.A. 588-89; Pet. App. 247a-49a. The district court entered each order after holding a hearing, carefully weighing the evidence of discrimination and evaluating the relief necessary to remedy that discrimination. *See* J.A. 553-87, 727-71; Pet. App. 236a-46a. Indeed, nonminorities had a greater voice before the entry of the consent decrees—because their interests were expressly represented by the BFA at the fairness hearing—than before the entry of the 1977 order. The lawfulness of the relief approved in both

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24 *See also Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 478 (1982) ("Stripping state court judgments of finality would . . . lessen[ ] the incentive for full participation by the parties and for searching review by state officials [and] . . . would violate basic tenets of comity and federalism" (citation omitted)).

orders was fully litigated, and both orders should be accorded the same finality.

4. Requiring persons with notice of a proposed decree to intervene in that litigation is fair to them and to the parties to the decree, and it resolves the lawfulness of the decree most efficiently.

Persons with notice that a proposed consent decree may affect their interests should assert their rights promptly. They should be required to present their position at the same time that the district court considers the other interests militating for and against the decree rather than be allowed to wait to commence a collateral lawsuit. That procedural rule would resolve the lawfulness of a proposed decree "swiftly but fairly". *Blonder-Tongue*, 402 U.S. at 327.

There is nothing remarkable in requiring persons to raise their claims in a timely fashion. For example, recipients of a "right to sue" letter must commence a lawsuit within 90 days or forever lose their day in court. 42 U.S.C. § 2000e-5(f)(1); *United Air Lines v. Evans*, 431 U.S. 553, 557-58 (1977). Similarly, statutes of limitations terminate claims after a specified period of time. *See Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944) ("even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and . . . the right to be free of stale claims in time comes to prevail over the right to prosecute them"). One on whom process has been served must act promptly or face default. *See* Fed. R. Civ. P. 55. And in *Penn-Central*, this Court denied the Borough of Moosic's right to prosecute a collateral lawsuit because it delayed in asserting its rights. 389 U.S. at 305-06. It is not unfair to require persons who know or should know that a proposed decree may affect them to assert their interests sooner rather than later. *See* J.A. 154. *See generally*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) ("The State may erect reasonable procedural requirements for triggering the right to an adjudication").[25]

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25 Prohibiting collateral lawsuits is certainly more fair to the parties to the decrees because it protects them from "the expense and vexation attending multiple lawsuits". *Montana v. United States*, 440 U.S. at 153; *see also University of Tennessee*, 106 S. Ct. at 3226. The defense of these collateral attacks has been expensive indeed. Although the Martin Petitioners are protecting the relief they obtained as civil rights *plaintiffs*, the district court *sua sponte* denied them attorneys' fees under the standards applicable to civil rights *defendants*. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978); Pet. App. 34a, 82a. That ruling is the subject of defendants' cross-appeal. R14-301.

Similarly, in habeas corpus proceedings collaterally attacking state court criminal judgments, this Court has been particularly unsympathetic to prisoners who delay in presenting their constitutional claims. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72 (1977). There, this Court established the "cause and prejudice" rule because it believed that a more lenient rule "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off". *Id.* at 89.

Collateral attacks of consent decrees provide just the sort of tempting opportunity for "sandbagging" that the Court feared in *Wainwright*. For precisely this reason, courts have rejected collateral attacks in civil cases. For example, in *Gorsuch*, the district court dismissed the National Wildlife Federation's collateral attack on a consent decree entered in a related case in which the Federation had objected to the decree but had not timely intervened. The Third Circuit affirmed, stating:

> "Clearly, plaintiffs were not outsiders unaware of litigation in progress that would ultimately affect their interests. In a deliberate choice of litigation strategy, they chose to stand on the sidelines, wary but not active, deeply interested, but of their own volition not participants. Although plaintiffs may not have had their day in court as litigants, they had the opportunity and for reasons of their own adopted a different approach. Plaintiffs cannot, at this stage, assert persuasively that the interest of finality should not prevail." 744 F.2d at 971-72.[26]

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26 Similarly, in *Bolden v. Pennsylvania State Police*, 578 F.2d 912 (3d Cir. 1978), the Fraternal Order of Police ("FOP") had participated, but had not intervened, in an action that led to an affirmative action consent

The same is true here. Just as the Federation "was tracking the progress" of the earlier litigation in *Gorsuch* (744 F.2d at 970), the BFA here followed the *Jefferson County* litigation from the outset (*see* J.A. 772-73). Indeed, the BFA sought for its members the best of both worlds: it expressly asked the district court to consider the interests of nonminority employees even though they "have not been made a party to this action". J.A. 703.

C. The Rule Barring Collateral Attacks on Consent Decrees by Persons Who Had Notice and the Opportunity To Be Heard Is Consistent with the Requirements of Due Process.

Due process requires that before being bound by a judicial determination, a person must be afforded *notice* and *the opportunity to be heard*. As this Court held in *Mullane v. Central Hanover Bank & Trust Co.*, the "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them *an opportunity to present their objections*". 339 U.S. at 314 (emphasis added). *See also Mathews v. Eldridge*, 424 U.S. at 333 (the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'" (citation omitted)). Moreover, "[i]t has been said so often by this Court and others as not to require citation of authority that due process

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decree. When the FOP sought to intervene four years later to challenge that decree, the Third Circuit denied its application:

> "[T]he FOP was seeking on behalf of its members the best of all possible worlds. Its counsel . . . could supplant, or at least supplement, the Assistant Attorney General assigned to the case in negotiating the most favorable consent decree, while it preserved the option of subsequently mounting collateral attacks on the same decree." *Id.* at 916.

The court held that the FOP was a *de facto* party to that litigation and was bound by its results. In doing so, the court noted that the FOP, like many nonparties with notice, chose not to intervene for strategic reasons. At an FOP meeting earlier in the litigation, its attorney admitted his "sandbagging" strategy: "I'm not going to let the court let me in—if he wants me in now in that capacity, I'm not going to let him bring me in. I'm going to withdraw so that you are not parties to it." *Id.* at 916.

is flexible and calls for such procedural protections as the particular situation demands". *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). Under the circumstances here, plaintiffs had their due process before the consent decrees were approved and have no due process right to bring these collateral lawsuits. [27]

There can be no doubt that plaintiffs were afforded both notice and the opportunity to be heard before the entry of the consent decrees, and they have never claimed otherwise. The BFA kept apprised of the well-publicized litigation that led to the consent decrees (J.A. 772-73), and the Eleventh Circuit concluded that "BFA members . . . knew at an early stage in the proceedings that their rights could be adversely affected". J.A. 154. When the consent decrees were proposed, notice of the fairness hearing was given by publication. Pet. App. 146a, 171a-75a, 222a-23a, 248a; J.A. 695, 697-98, 727-28. Such actual notice satisfies due process. *See National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964).

The fairness hearing provided plaintiffs the opportunity to be heard. Not only did they have the *opportunity* to be heard, but their interests were presented by the BFA and Mr. Fitzpatrick and *were* heard. *See* J.A. 699-716, 728, 730, 732-40, 747-50, 770. Even though the BFA chose to appear as an objector rather than an intervenor, its opportunity was meaningful, as demonstrated by the fact that the district court "reviewed with care" its objections. *See* Pet. App. 246a. [28] There is no due process requirement for an additional hearing

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27 *See Mathews*, 424 U.S. at 333-35, 340-43 (terminating disability benefits causes less "potential deprivation" than terminating welfare benefits and therefore requires less procedural protection); *cf. United States v. Paradise*, 107 S. Ct. 1053, 1073 (1987) (plurality opinion) (the denial of a promotion raises lesser Equal Protection concerns than a layoff); *id.* at 1076 (Powell, J., concurring).

28 Objections by nonparties have led to modifications of proposed consent decrees by parties and courts. *See, e.g., United States v. City of Miami*, 664 F.2d at 438-39, 444 (opinion of Rubin, J.); *Dawson v. Pastrick*, 600 F.2d 70, 73-74 (7th Cir. 1979); *Johnson v. North Carolina State Highway Patrol*, 91 F.R.D. 406, 407 n.1 (E.D.N.C. 1980); *Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't of White Plains*, 505 F. Supp. 955, 960 (S.D.N.Y. 1981).

when there is little "probable value" of that hearing, particularly where, as here, plaintiffs have come forward with nothing that the district court did not consider in 1981. *See Mathews*, 424 U.S. at 343-46; *see also* n.23, *supra*. [29]

The fact that plaintiffs, with notice of the original litigation and the proposed consent decrees, failed to intervene in that action in no way means that they were not afforded the process due them. It is the *opportunity* to be heard that is the essence of due process. As this Court held in *Kremer*, the "fact that [plaintiff] failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy". 456 U.S. at 485 (citation omitted). There, the Court held that the plaintiff had not been denied due process even though his decision to pursue a remedy in state proceedings precluded him from relitigating his claim in federal court. *Id.* at 482-85. Similarly, in *Marino v. Ortiz*, 108 S. Ct. 586, 587 (1988) (per curiam), the objectors' decision not to intervene and become parties to the consent decree litigation prevented them from appealing the approval of the decree. And in *Penn-Central*, the Court expressed no concern that due process would be violated by precluding a nonparty from relitigating an issue when that nonparty "had an adequate opportunity to join in the litigation". 389 U.S. at 505. Having foregone the opportunity to be heard at the fairness hearing, plaintiffs have no due process right for a *second* opportunity to be heard in a collateral attack.

II. IN ANY EVENT, PLAINTIFFS' DISCRIMINATION CLAIMS WERE TRIED BELOW.

Although the district court held—correctly, the Martin Petitioners submit—that plaintiffs could not collaterally attack a Title VII consent decree, it nevertheless considered, in the alternative, the merits of their attack. It tried plaintiffs' reverse discrimination claims, reconsidered the lawfulness of the con-

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29 Thus, the due process concerns expressed in the dissent in *Ashley*, 464 U.S. 900, are not present here. There, nonminority employees could not have had notice or the opportunity to be heard because the consent decree was submitted on the same day that the United States's complaint was filed, three days prior to its approval without a hearing. *See* pp. 17-18, *supra*.

sent decrees and held that the promotions at issue did not violate plaintiffs' rights. Without referring to those facts, the court of appeals inexplicably found that "the [district] court did not decide the plaintiffs' Title VII and equal protection claims". Pet. App. 12a. [30] That finding had no basis and is clearly erroneous as a matter of law.

After the complaints were filed below, defendants filed motions to dismiss them as impermissible collateral attacks on the consent decrees. *See* J.A. 121-27, 220-24. In denying those motions, the district court stated that it was prepared to hold that "if preferential treatment is mandated by the decree, then it constitutes a good defense". J.A. 237. [31] However, neither party limited itself to that issue. Throughout the pretrial proceedings plaintiffs maintained that the decrees were unlawful (*see, e.g.*, Plaintiffs' First Pre-Trial Mem. at 29-54 (Dec. 5, 1985) ("Plaintiffs' Mem.")), at trial both sides introduced evidence concerning the validity of the decrees and the court did not dispose of that issue until the trial's conclusion.

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30 Just as inexplicably, the court of appeals denied without comment petitions for rehearing pointing out this alternative holding. Pet. App. 25a-26a.

31 The "mandated" test is from the Eleventh Circuit's opinion in *United States v. Jefferson County*, 720 F.2d at 1518; J.A. 158. The district court construed *Jefferson County* to mean that acts "mandated" by the decrees could not be held to be discriminatory, but that actions merely permitted by the decrees might not be absolutely protected by them. *See* J.A. 237-38, 280-82. Thus, the primary focus of the 1985 trial was whether the challenged promotions were required by the decrees. Plaintiffs argued that because the City decree excuses the City from meeting its affirmative action goals if it hires or promotes a nonminority "who is demonstrably better qualified based on the results of a job related selection procedure" (Pet. App 60a, 104a, 124a), the promotion of such a "demonstrably better qualified" person would not be "mandated" by the decrees. *See* J.A. 231, 414. Therefore, much of the evidence at the 1985 trial concerned the relative qualifications of plaintiffs and the persons promoted.

At the conclusion of trial, the district court held that the plaintiffs had failed to prove that they were "demonstrably better qualified [than the persons promoted] based on the results of a job related selection procedure". Pet. App. 27a-29a, 77a-79a. The challenged promotions were found to be required by the decrees and thus not discriminatory.

A. Both Sides Briefed the Issue of the Validity of the Consent Decrees in Their Pre-Trial Memoranda.

In their complaints, plaintiffs directly attacked the consent decrees, seeking a declaratory judgment that the decrees were "void as illegal, unconstitutional, vague and indefinite, and violative of public policy", and they sought to enjoin the City from complying with the decrees' provisions. *See* Pet. App. 115a; J.A. 35-36, 38-39, 91-92, 98-99. Both parties in their pre-trial memoranda briefed extensively the question whether the consent decrees' race-conscious relief was impermissible reverse discrimination. *See* Plaintiffs' Mem. at 29-54; Defendants' Joint Pre-Trial Mem. at 69-84 (Dec. 12, 1985) ("Defendants' Mem."). Plaintiffs, in their memorandum, argued, *inter alia*, that the consent decrees unnecessarily trammeled their interests (*see* Plaintiffs' Mem. at 29-30, 36-38), that the relief was improper under *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (*see id.* at 36-38), and that it was unlawful under *Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984) (*see id.* at 38-40, 42, 48-54).

Defendants maintained that plaintiffs' collateral attack was improper. Defendants' Mem. at 65-68. Nevertheless, they argued in their pretrial memorandum that "assuming that the validity of the Decree is at issue in this case, the Decree's affirmative action plan for the hiring and promotion of blacks is clearly a valid remedy to correct the effects of prior racial discrimination". *Id.* at 65. Defendants then argued that the race-conscious relief was justified by the significant evidence of discrimination by the City (*see id.* at 72-80), that the numerical goals of the decree were appropriate (*see id.* at 81) and that the decrees did not unnecessarily trammel the interests of white employees (*see id.* at 82). There can be no doubt that both parties prepared for trial contemplating that the validity of the decrees' race-conscious relief would be before the district court.

B. Evidence Was Introduced at Trial on the Issue Whether the Consent Decrees Were Lawful or Violated the Rights of the Plaintiffs.

Although defendants asserted that plaintiffs could not collaterally attack the decrees, they recognized that plaintiffs had

asked the district court to declare the decrees unlawful and that the district court had not yet ruled on whether the collateral attacks could go forward. Thus, at trial defendants introduced substantial evidence from which the district court could evaluate the lawfulness of the decrees. [32] Defendants tried their case in the alternative in order to avoid just the result that the court of appeals imposed—an unnecessary retrial.

To prove that the consent decrees satisfied Title VII and the Equal Protection Clause, defendants introduced—and the district court admitted—evidence that (1) there was sufficient evidence of discrimination to justify the decrees' race-conscious relief, and (2) the decrees did not unnecessarily trammel the interests of plaintiffs. [33] That evidence is relevant only to whether the decrees are valid; [34] it has nothing whatsoever to

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32 The United States sought to prevent defendants from introducing evidence to support the validity of the consent decrees. *See* J.A. 351-52. It argued that the "United States . . . is not challenging the validity of the Decree" and although "the private plaintiffs seek to challenge the Decree", there are "limitations on the extent to which a nonparty can undermine a prior judgment" that rendered defendants' evidence in support of the decrees irrelevant. Memorandum in Support of Motion in Limine of United States at 4-5 (Dec. 3, 1985) (citation omitted). *The district court denied the United States's motion, holding that the evidence supporting the lawfulness of the decrees might be "of some significance", especially to "an appellate court reviewing the matter".* J.A. 353 (emphasis added). At trial, counsel for the United States repeated its objection, stating "[w]e think that the plaintiffs are limited in their ability to challenge the validity" of the decrees (J.A. 405), which just reflected the point obvious to all—plaintiffs *were attacking* the decrees.

33 For example, defendants proved that plaintiffs' interests have not been unduly trammeled because 8 of the 15 plaintiffs had been promoted by the time of trial, and the others were free to continue to compete for a promotion. *See* Pet. App. 40a, 85a; J.A. 371, 377-79, 385; R2-265; R3-313 to 14, 358 to 59, 363, 380; R7-976 to 77, 997 to 98. As of today, it appears that all but two plaintiffs have been promoted. See the consent decree compliance reports filed with the district court.

34 *See Weber*, 443 U.S. at 197, 208; *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1449-53, 1455-56 (1987); *see also Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3051-53 (1986) ("*Sheet Metal Workers*") (plurality opinion); *id.* at 3055-57 (Powell, J., concurring); *Paradise*, 107 S. Ct. at 1065-66, 1070-73 (plurality opinion); *id.* at 1075-76 (Powell, J., concurring).

do with whether the challenged promotions were "mandated" by the decrees.

The evidence of discrimination that defendants introduced to establish the validity of the decrees was overwhelming. Not only did defendants introduce the transcripts, exhibits and opinions from the 1976 trial, the 1979 trial and the fairness hearing, [35] but they introduced additional evidence of discrimination. [36] *See also* pp. 4-6, *supra*. Defendants also introduced evidence of "informal mechanisms [that] obstruct equal employment opportunities", "even where the employer . . . formally ceases to engage in discrimination". *Sheet Metal Workers*, 106 S. Ct. at 3036. For example:

- Mr. Duncan, the head of the Engineering Department, favored Mr. Ware (a plaintiff here) for promotion over Mr. Thomas because Mr. Ware was white. Pet. App. 31a, 56a, 81a, 100a-01a.
- Black firefighters have been instructed to sleep in particular beds in the firehouse during 24-hour shifts, even though white firefighters are free to sleep in any bed. R7-953 to 54. [37]
- The request by Mr. Davis, a black firefighter, for EMT III training was rejected by his white supervisor without explanation, despite the fact that he had been a medic in Vietnam and had studied in a physician's assistant program at Emory University. He did not receive the training until four years later. R6-819 to 22.

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35 *See* DX 1422, 1423, 1424, R10-1279 to 81, R10-1305 to 07; J.A. 593-694, R10-1280 to 81; DX 1977, DX 1978, DX 1978A, DX 1979, DX 1980, DX 1980A, J.A. 403-408; J.A. 427-71, 407-08.

36 *See* J.A. 380-81, 383-84; J.A. 436-47, R1-27; J.A. 427-28, 398-400; DX 2177, R9-1273 to 74, R10-1284; DX 2210, DX 2212, DX 2213, DX 2216, R9-1292 to 96, 1300 to 04.

37 In the Streets and Sanitation Department, the City had racially segregated bathrooms as recently as 1979. 1979 trial PX 43 at 73-81, 1979 trial PX 44 at 98-104, 1979 trial PX 48 at 77, 80-85, 1979 trial PX 50 at 37-40, J.A. 403-08.

- Although firefighters are usually made acting officer based on station seniority, Mr. Wilks, who is white and a plaintiff here, was made an acting officer over Mr. Davis, who is black and then had greater station seniority. R4-454 to 55; R6-825 to 26.
- Mr. Isaac, who is black, was assigned back-to-back watches to punish him for his statement that he believed that the consent decrees were fair. R6-888 to 90.

It was not only defendants who tried the decrees' validity. Counsel for plaintiffs argued below in summation that the evidence showed that the consent decrees' race-conscious relief was unlawful. He argued that "the use of race in a conclusory fashion is improper" (J.A. 412, 415-16), that none of the blacks who were promoted had been shown to be individual victims of discrimination (J.A. 411-13), that there was insufficient evidence of prior discrimination to justify race-conscious relief (J.A. 410-12), and that the short-term goal for promoting blacks impaired the opportunities of white employees (J.A. 413-15). He concluded that the issue whether plaintiffs' interests were trammeled because allegedly less qualified persons were promoted instead "has been framed quite well". J.A. 414. Counsel for defendants responded in summation that there was more than enough evidence of discrimination to support the decrees and that the decrees did not unnecessarily trammel the rights of whites. J.A. 422-26. *None of those arguments related to whether the City's actions had been required by the decrees; they were offered solely on the issue of the decrees' validity.* Plaintiffs' counsel had every opportunity to present his case, and no evidence that he sought to introduce to demonstrate that the decrees were invalid was excluded by the district court.

C. The District Court Explicitly Ruled on the Very Question That the Court of Appeals Remanded for Its Consideration.

In the face of plaintiffs' arguments that the decrees' race-conscious relief was unlawful reverse discrimination, and after considering the extensive evidence adduced at trial on that issue, the district court *expressly* rejected plaintiffs' claims of discrimination and held that the "City Decree is lawful". Pet. App. 61a, 106a. The district court further held that:

> "[u]nder all the relevant case law of the Eleventh Circuit and the Supreme Court, it is a proper remedial device, designed to overcome the effects of prior, illegal discrimination by the City of Birmingham." Pet. App. 62a, 106a.

The district court specifically stated that, although it had considered the lawfulness of the decrees in 1981 when it approved them, it was ruling on that question again:

> "In *United States v. Jefferson County* . . . this Court found the City and Board Decrees to be warranted by the evidence of discrimination by the City, based on the factors set forth in *United States v. Alexandria*, 614 F.2d 1358 (5th Cir. 1980), and the other applicable decisions of the several courts of appeals. Plaintiffs have demonstrated no facts demonstrating that the previous conclusion of the Court was in any way in error." Pet. App. 39a, 84a-85a.

The district court specifically held that the interests of white employees were not "trammeled by the Decree". Pet. App. 40a, 85a.

It is plain that, in focusing on the district court's alternative ruling concerning collateral attacks, the court of appeals simply overlooked that the district court allowed the collateral attack to proceed and ruled that the decrees' race-conscious relief was lawful and that plaintiffs' claims of discrimination were without merit. That question was briefed, tried, argued and decided below.

On appeal, not even plaintiffs suggested to the court of appeals that the district court had not tried their claims. To the contrary, they acknowledged that "[a]gain, in its December 1985 Conclusions of Law, the District Court upheld the legality of the Birmingham Consent Decree". Brief for Plaintiffs-Appellants-Cross-Appellees Wilks, *et al.*, at 53. Indeed, in response to direct questions from Judge Tjoflat during oral argument, counsel for plaintiffs expressly denied that the trial court had deprived plaintiffs of an opportunity to present their claims of reverse discrimination. [38] Regardless of what this

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38 Pursuant to Eleventh Circuit Rule 34-4(g), oral arguments are recorded by that court, but copies of the transcripts are not available to counsel.

Court decides on the permissibility of collateral attacks, the conclusion by the court of appeals that plaintiffs did not have their day in court in this case is flatly wrong.

The district court has already considered the lawfulness of the decrees' race-conscious relief *twice*—once in 1981 when it approved the decrees, and again in this case in 1985 when it tried and rejected plaintiffs' reverse discrimination claims. The decision by the court of appeals would require the district court to consider the lawfulness of the decrees yet a third time. That would needlessly consume judicial resources while extending for all the unsettled situation that has existed since this litigation began fourteen years ago.

CONCLUSION

For the foregoing reasons, Petitioners John W. Martin, *et al.*, respectfully request that the decision of the court of appeals be reversed and that the case be remanded with instructions to enter judgment for the defendants.

August 18, 1988

Respectfully submitted,

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SUPREME COURT, U.S.
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No. 87-1614, 87-1632, 87-1633

In The

Supreme Court Of The United States

October Term, 1988

JOHN W. MARTIN, *et al.*,
Petitioners,

v.

ROBERT K. WILKS, *et al.*,
Respondents.

PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,
Petitioners,

v.

ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *et al.*,
Petitioners,

v.

ROBERT K. WILKS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS ROBERT K. WILKS, *et al.*

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QUESTION PRESENTED

Whether the discrimination claims of unconsenting non-minority employees should be dismissed as impermissible collateral attacks if the employer claims to act pursuant to a consent decree which contemplates race conscious employment decisions.

PARTIES TO THE PROCEEDINGS BELOW

Private Plaintiffs

Robert K. Wilks
James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
Dudley L. Greenway
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Phillip H. Whitley
Marshall G. Whitson
David H. Woodall

Plaintiff-Intervenor

United States of America

City Defendants

Richard Arrington, Jr.
City of Birmingham

Personnel Board Defendants

Personnel Board of Jefferson County
Roderick Beddow, Jr.
Joseph W. Curtin
James W. Fields
Patricia Hoban-Moore
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Defendant-Intervenors

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas
Wanda Thomas

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Kramer, *Consent Decrees and the Rights of Third Parties,* 87 Mich.L.Rev. (forthcoming in November 1988) 18, 33, 41, 43, 47

Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties,* 1987 Legal Forum 103 (1987) 19, 45

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STATEMENT

Respondents Robert K. Wilks, *et al.* are fifteen individual white male employees of the City of Birmingham Fire & Rescue Service ("BFRS") and one white male employee of the City of Birmingham Engineering Department.[1] Pet. App. 82a.[2] Each would have been promoted to a position as a Fire Lieutenant, Fire Captain or Civil Engineer but for the race conscious conduct of the City of Birmingham ("City"). Pet. App. 79a, 105a. The respondents filed individual suits against the City, Mayor Richard Arrington, Jr., and the Personnel Board of Jefferson County ("Board")[3] under Title VII and the Equal Protection Clause.[4] The defense to these suits was premised upon a claim of compliance with consent decrees entered in litigation to which respondents were not parties. Pet. App. 37a-38a.

A. The Consent Decree Cases.

During 1974 and 1975, racial discrimination suits were filed in the United States District Court for the Northern District of Alabama by the United States, by the Ensley

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[1]In addition, an association of employees of the City is a plaintiff-respondent. Pet. App. 67a.

[2]The form of citations is as follows: the Appendix to the Petitions for Certiorari is cited as "Pet. App."; the Joint Appendix is cited as "J.A."; exhibits to the 1985 trial are cited as "PX" (plaintiffs' exhibits) or "DX" (defendants' exhibits); the transcript and exhibits from the 1979 trial were admitted in the 1985 trial (*see* J.A. 403-08) as DX 1979 and DX 1980 and are cited as "1979 trial PX" or, for the trial transcript, "[month] 1979 tr."; and the record in the Court of Appeals is cited as "R[volume]-[document number]-[page]".

[3]The Personnel Board is an independent entity created by Act No. 248 of the 1945 Alabama Legislature, as amended. PX 1; R1-27. It administers a civil service and merit system for public employees of the City, Jefferson County and other municipalities in the county. The Board administers examinations for entry level and promotional positions in the BFRS, and ranks employees for consideration by the City on the basis of test scores and seniority. J.A. 429-435, 553-554.

[4]Claims under 42 U.S.C. § 1981 and state law were also alleged. The suits were filed within the statute of limitations following the denial of promotional opportunities to the individual plaintiffs. Each plaintiff exhausted administrative remedies before the Equal Employment Opportunity Commission. PX 425-454, R1-40.

Branch of the NAACP, and by a class of blacks which included petitioner John W. Martin. Pet. App. 3a-4a. The complaints charged that the City, the Board, Jefferson County and numerous other municipalities had engaged in employment practices resulting in unlawful discrimination against blacks and women. Pet. App. 236a-237a. The district court consolidated the suits and severed the issues for separate trials pursuant to Rule 42, F.R.Civ.P. Pet. App. 4a-5a.

At issue in the first trial was whether the Board's use of entry-level Office Worker, Firefighter and Police Officer examinations unlawfully discriminated against blacks. The district court found that the Board's use of the Firefighter and Police Officer tests violated the Title VII rights of blacks; no violation of law was found in the use of the Office Worker test. J.A. 553-599. Citing the good faith voluntary efforts of the Board to administer nondiscriminatory tests and affirmatively to recruit blacks for public employment, the district court rejected the claims of the plaintiffs under the Equal Protection Clause of the Fourteenth Amendment.[5] J.A. 556-557. As a remedial device, the district court ordered the Board to comply with a short-term referral quota and thereafter achieve a goal of referral of blacks for entry-level

[5]The assertion of *amici* NAACP Legal Defense and Education Fund, *et al.* br. 7 n.9, that Birmingham is a recalcitrant employer of the sort found in *United States v. Paradise*, 480 U.S. 149 (1987) and *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986) is baseless. In 1977, the district court noted that the Martin plaintiffs and the United States had failed to prove intentional discrimination and rejected their constitutional and § 1981 claims. J.A. 556-557. The City consent decree made note of the good faith efforts of the City to comply with the civil rights statutes through adoption of fair hiring ordinances and the adoption of voluntary affirmative action plans. Pet. App. 123a, 124a. Petitioner Richard Arrington, Jr., the first black Mayor of Birmingham, has served as Mayor since 1979 and has long supported preferential treatment for blacks. PX 403, R1-20. A majority of the citizens of Birmingham and a majority of its city council members are black. Indeed, Birmingham's affirmative action policies have resulted in two challenges to its minority contractor set-aside ordinances. *See, Arrington v. Associated General Contractors*, 403 So.2d 893 (Ala. 1981), *cert. denied*, 445 U.S. 913 (15% set-aside struck down); *Associated General Contractors v. City of Birmingham*, CV-77-506-014-WAT (Cir. Ct. Jefferson County, Ala.) (pending challenge to City's current 35% set-aside for black contractors).

Firefighter positions based on applicant flow. J.A. 588-589. The district court's findings, in relevant part, were upheld on appeal. *Ensley Branch of the N.A.A.C.P. v. Seibels*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980). Many blacks were thereafter hired, long before entry of the consent decrees. J.A. 438. Vacation of that order has not been sought.

A second trial was held in August and October, 1979. At issue were eighteen additional tests and various other screening devices and rules used by the Board. Pet. App. 237a. Fire Department promotional examinations were not attacked. J.A. 594-595. As in the first trial, the City did not participate, and the independent claims against the City were never tried. Pet. App. 16a, 237a; J.A. 762.

Prior to the court's decision in the second trial, counsel for the parties in the *Jefferson County* litigation engaged in lengthy, secret negotiations which resulted in the City and Board Consent Decrees. Pet. App. 237a; J.A. 520-522. These decrees were tendered to the district court judge and provisional approval was entered on June 8, 1981 in summary fashion. J.A. 694-696. The district court found the consent decrees to be "fair, reasonable and lawful settlements." The court approved the consent decrees "subject to further hearings" and the consideration of "any objections which may be filed and presented at a fairness hearing in accordance with the procedures explained below." J.A. 695.[6] It was further ordered that notice be given to all "interested persons." However, adequate notice was not given to the employees of the BFRS sufficient to indicate that their promotions would be adversely affected.

A public statement was published in the classified section of the *Birmingham News* on June 14 and 21, 1981. The

[6]The district court's June 8, 1981 Order provided the following procedure for the presentation of objections:

> All objections to the Consent Decrees must be filed in writing with the Clerk of the Court by July 14, 1981. The Clerk shall forward copies of any such objections to counsel for the parties to the Consent Decrees as they are filed. A fairness hearing will be held on August 3, 1981 at 9:00 a.m. in Courtroom 2.

J.A. 695-696.

contents of the statement were materially different from a much more detailed notice mailed to minority employees and to black class members. In relevant part, the published statement provided that the "Consent Decrees contain a number of general injunctive provisions, including goals for blacks and women, each of which are designed to correct for the effects of past discrimination and to insure equal opportunities for all applicants and employees with the City and in the civil service system administered by the Personnel Board." Pet. App. 174a. While the statement addressed the appropriate relief to be granted with respect to alleged Fire Department hiring discrimination through the Board's test, Pet. App. 172a, nothing in the published statement indicated that BFRS promotional goals were to be included in the consent decrees. Significantly, the notice which was mailed to black employees included copies of the entire consent decrees, Pet. App. 144a, and a different notice explaining in detail the long-term and interim annual promotional goals and quotas in the BFRS. Pet. App. 180a-189a. The decrees made no provision for posting in the workplace.

The public statement required that written objections were to be filed by July 14, 1981. The statement did not say whether evidence would be taken at the fairness hearing and failed to outline the procedure which would be followed at the hearing. Pet. App. 171a-175a.

The litigation did not have the notoriety that petitioners suggest. While BFRS Chief Gallant knew that the litigation was pending, he did not know that Fire Department promotions might be at issue. J.A. 452. The City consent decree was negotiated secretly by the City's attorneys, who were in communication with the Mayor. After the decree was negotiated, Council approval was sought for the backpay provision whereby the City settled massive backpay claims for a total backpay liability of only $265,000. Mayor Richard Arrington, Jr. testified that he certainly did not oppose committing the City to the injunctive provisions of the decree, and in view of the meager backpay award and receipt of tools to prefer blacks in employment, deemed the entire

matter to be "the best business deal [the City] had ever struck." J.A. 520-527.

In accordance with the procedure for objections dictated by the district court, the Birmingham Firefighters Association (BFA) and its President filed written objections and appeared at the fairness hearing through the undersigned counsel of record. J.A. 699-713; 732-740. At the August 3, 1981 fairness hearing, the BFA announced that it would promptly move to intervene in order to continue to protect and assert its interests. J.A. 730. The district court responded that a motion to intervene would be denied as untimely given the passage of a lengthy period of time since the trial on the entry-level Firefighter test. J.A. 771. At the close of the hearing, the court announced that it would receive additional briefs until August 5, 1981. J.A. 770.

On August 4, 1981 the BFA and two of its members filed a motion to intervene as of right under Rule 24, F.R.Civ.P. J.A. 774-776; Pet. App. 6a. The movants were Billy Gray, a white male Fire Lieutenant, Tommy Sullivan, a white male Firefighter, and the BFA. Movants sought to intervene both individually and as representatives of the "presently-employed firefighters of the City of Birmingham." J.A. 774. Movants represented that they "desire to intervene in this action solely for the purpose of contesting the legality of the proposed consent decrees" and that they had been unaware of the ongoing secret settlement negotiations. J.A. 773. *See also,* Pet. App. 237a (court aware of ongoing negotiations). On August 5, 1981, the BFA filed, in timely fashion, a supplemental memorandum which noted that intervention was sought in order to "preserve [movants'] rights to object to the provisions of the Decrees." J.A. 781.

The district court entered an order approving the consent decrees on August 21, 1981. Pet. App. 247a-249a. The court's accompanying opinion rejected all objections to the consent decrees[7] and approved the settlement under the

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[7]The court justified the BFRS promotional goals on the 1977 findings of entry level discrimination. Pet. App. 244a. The Eleventh Circuit, in its 1985 opinion, questioned the validity of a rationale that such findings required adoption of promotional goals and quotas. Pet. App. 19a.

"reasonableness" standard.[8] In addition, the district court found the motion to intervene to be untimely since "[t]he litigation has been pending for over five years and has been vigorously contested by the existing parties through two trials and one appeal." Pet. App. 246a.

A timely appeal was filed by the BFA in which it sought to overturn the denial of its motion to intervene. *United States v. Jefferson County,* appeal no. 81-7761 (11th Cir.). In addition, the BFA sought reversal of the approval of the consent decrees.[9]

The United States Court of Appeals for the Eleventh Circuit found that the district court did not abuse its discretion by denying intervention to the BFA and its members in the consent decree case. *United States v. Jefferson County,* 720 F.2d 1511 (11th Cir. 1983); J.A. 149-161. The appeals court found that the President of the BFA had been aware of the litigation and that no existing party then represented its interests. J.A. 154-155. In addition, the court held that intervention following the announcement of the decrees would "have plainly prejudiced the existing parties since it would have nullified these negotiations . . . " J.A. 155. Finally, the court found that the BFA and its members would suffer no prejudice by a denial of intervention since individual firefighters were free to "institut[e] an independent Title VII suit, asserting the specific violation of their rights." J.A. 158. The Eleventh Circuit expressly rejected the "impermissible collateral attack" doctrine followed by other

[8]This Court rejected the "reasonableness" standard for approval of a public employer's affirmative action plan in *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986). In addition, the district court noted that the decree might not correspond with the findings of discrimination it would have made or the remedial relief it would have ordered had it completed the decision that was being drafted. Pet. App. 246a.

[9]*See,* Brief of Appellant, *United States v. Jefferson County,* appeal no. 81-7761 (11th Cir.). The appeals court, upholding the denial of intervention, did not reach the legality of the decree provisions. J.A. 149-161.

circuits and advanced by petitioners here,[10] and noted that its decision parallelled the analysis of *Ashley v. City of Jackson,* 464 U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of *certiorari*). J.A. 156-159.

B. The Reverse Discrimination Litigation.

While the appeal from the denial of intervention was pending, the first of the individual respondents' complaints was filed on April 14, 1982. Pet. App. 110a (*Bennett v. Arrington,* number CV-82-P-0850-S (N.D. Ala.)). Respondents sought preliminary and permanent injunctive relief against race-conscious promotions which respondents claim violated Title VII, the Equal Protection Clause of the Fourteenth Amendment, § 1981 and Alabama state law. Pet. App. 112a-116a. The *Bennett* respondents also alleged that the City and the Board were unlawfully promoting employees on a racial basis under the "assumed protection of consent settlements . . . " Pet. App. 113a. The *Bennett* respondents' application for preliminary relief, J.A. 35-39, was denied after an oral hearing on the question whether the provisions of the consent decrees required the challenged race-based promotions. J.A. 49-86. The Martin petitioners intervened and claimed the suit was an impermissible collateral attack on the consent decrees and was, therefore, due to be dismissed. J.A. 78-79. An appeal was taken from the denial of the preliminary injunction, J.A. 48, which the Eleventh Circuit consolidated with the appeal from the denial of the BFA's motion to intervene in the consent decree case.[11] J.A. 149.

[10]The petitioners, who were all parties to the *Jefferson County* appeal, at no time sought review by this Court, and should be estopped in their attempts to relitigate the decision that respondents are not bound by the decrees and may pursue their independent claims of discrimination against their employer. Indeed, it was in reliance on that decision against petitioners that these cases have been vigorously pursued.

[11]The Eleventh Circuit affirmed the denial of preliminary relief in *Bennett*. Appeal no. 82-7129 (consolidated with *U.S. v. Jefferson County*), J.A. 149-161. The court found that respondents failed to show irreparable injury, a necessary requirement for preliminary relief, and could be made whole through awards of backpay, remedial seniority and mandatory promotion should they prevail at a hearing on the merits. J.A. 160-161.

Following the initiation of the *Bennett* complaint, other white male City employees filed discrimination complaints in the United States District Court for the Northern District of Alabama, the same district court which had entered the consent decrees. J.A. 93 (*B.A.C.E. et al. v. Arrington*), 130 (*Wilks, et al. v. Arrington*). The various complaints were consolidated, pursuant to an agreement between the judges of the district court, J.A. 210, in a single case file captioned *In re: Birmingham Reverse Discrimination Employment Litigation,* J.A. 218. The cases were assigned to Judge Pointer, the same judge to whom the first reverse discrimination case had been assigned and the judge who had entered the consent decrees.

The petitioners promptly sought dismissal of these cases claiming that they constituted impermissible collateral attacks on the consent decrees. J.A. 220-224. On May 14, 1984, the district court refused dismissal. The court then held that the plaintiff-respondents had to prove that the provisions of the consent decrees did not require the challenged race-based promotions. The court determined that the only factual issue was whether, under the terms of the City consent decree, the black promotees were demonstrably less qualified than the respondents. Paragraph 2 of the City decree provides: "Nothing herein shall be interpreted as requiring the City to . . . promote a person who is not qualified, or to . . . promote a less qualified person in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure." Pet. App. 124a. The City contended that paragraph 2 had never been "invoked," was therefore irrelevant, and was not considered in making promotions. Indeed, the City admitted, and the district court found, that the City promoted the black candidates without consideration of the relative qualifications of all the candidates. Pet. App. 105a. In addition, the district court required that the respondent plaintiffs prove that the City knew at the time of promotion that the black promotees were demonstrably less qualified. Pet. App. 28a, 29a; J.A. 237.

The district court held further that respondents could not

challenge the lawfulness of the consent decrees.[12] Consequently, the question whether the race-based promotions were permissible under Title VII and the Equal Protection Clause was eliminated and the case limited to the inquiry whether the consent decrees mandated the challenged promotions.[13]

A five-day bench trial was held in December 1985 at which respondents, in accordance with the pretrial orders of the court, demonstrated that the consent decrees did not mandate the challenged actions because of the disparities in qualifications of the competing black and white candidates. The relative qualifications of each black and white candidate were proven by using simple, objective criteria summarized by chart exhibits. J.A. 487-501. In addition, respondents offered the test scores of the competing candidates, and expert testimony of the statistical disparities in those scores. Pet. App. 87a-91a. Respondents submitted deposition testimony of the BFRS Fire Chief, the BFRS Deputy Chief, and the City's Chief Personnel Affirmative Action Officer which

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[12]The transcript reflects the following from the May 14, 1984 hearing on the motions to dismiss:

> MR. JOFFE: In essence, your honor, saying it is not open as an issue as to whether the decrees are per se unlawful or whether the decrees are unlawful in some other ways. You seem to be saying that you will hold that the decrees are unlawful. [sic — counsel obviously said "lawful"]
>
> THE COURT: That is correct. That is an issue, as I view it, the Court of Appeals did not decide but then it still is a question of lawful in the sense that the mandated aspects of the Decree may be carried out without liability. As I understand the Court of Appeals' decision, that is a permissible conclusion to be reached with their decision.

J.A. 250-251. *See also* J.A. 281. The Martin petitioners representation that validity of the decrees was an issue for trial, Brief at 11, is false.

[13]*See* J.A. 277-291 (district court's interim opinion dated Feb. 18, 1985 finding that defendants may prevail if they "establish that the challenged promotions were made because of the consent decree," J.A. 280). Thereafter, the district court strictly supervised and limited pretrial preparation in accordance with its position and instructed respondents to try their case in four days. *See* J.A. 329, 340-355. In addition, in its Feb. 18, 1985 Opinion, the district court again summarily held valid the "affirmative action aspects of the decrees regarding . . . promotion of blacks . . . " J.A. 281.

positively demonstrated that the City at no time considered the relative qualifications of the black and white candidates and issued promotions strictly on a one-for-one racial basis without regard to relative qualifications. J.A. 453-477; 502-514.[14]

The defense consisted mainly of the trial records of the 1976 and 1979 trials offered by the City "not for the truth of any matter asserted" in those records but "simply [to show] what was before the Court and the parties to the consent decree at the time it was entered." J.A. 403; DX 1977, 1978-A, 1979, 1980-A. The Court received the records on that limited basis with respect to the Wilks respondents only. J.A. 405-406. The respondents did not attempt to contest this record information since it was beyond doubt that such a record "was before the Court and the parties to the consent decree at the time it was entered."

At the conclusion of the trial, the district court entered, with minor modification, proposed findings of fact and conclusions of law submitted by the defendants. Pet. App. 27a-66a. The court held that the City was permitted, pursuant to the consent decrees, to promote demonstrably less qualified persons on the basis of race without using any job-related selection procedure. Pet. App. 105a-108a. The court reiterated its earlier holding that the consent decrees were valid remedial devices and that the respondents "cannot collaterally attack the Decree's validity." The court explained that the "only avenue of attack open to the private plaintiffs is to show that the challenged action was not taken pursuant to the Decree." Pet. App. 61a-62a. The district court entered findings that neither plaintiff-respondents, nor their privies, were parties to the consent decrees, Pet. App. 70a, 75a, 105a; that, with one possible exception, none of the black promotees were victims of past discrimination; that while the challenged fifty percent goal was implemented

[14]Notwithstanding the proviso of paragraph 2 of the City decree, p. 8, *supra*, the district court found that the City was permitted by its consent decree to ignore relative qualifications of prospective employees and therefore could use no job-related selection procedure. Pet. App. 105a-106a, 108a.

the relevant labor pool for Fire Lieutenant candidates was between nine and thirteen percent black, Pet. App. 105a-106a; and that but for their race each respondent would have been promoted and the City had made no effort to use a job-related selection procedure in evaluating promotional candidates, Pet. App. 105a-106a.

C. The Decision Of The United States Court Of Appeals For The Eleventh Circuit In The Reverse Discrimination Litigation.

Respondents Wilks, *et al.* appealed to the United States Court of Appeals for the Eleventh Circuit. That court reversed and remanded. *In re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d 1492 (11th Cir. 1987); Pet. App. 3a-26a.

On appeal, respondents claimed that the district court had erroneously required them to prove that the challenged promotions were not made pursuant to the consent decrees and had improperly bound them to the terms of the decrees. In addition, respondents demonstrated that the petitioners' conduct was not within the purview of lawful affirmative action and the district court's findings that the City's conduct was mandated by its consent decree was clearly erroneous.

Relying on this Court's decision in *Local No. 93 v. City of Cleveland,* 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986), the Eleventh Circuit held that "even if a consent decree purports to affect the rights of third parties, those parties are not bound by the terms of the decree unless their interests were adequately represented by a party to the decree." Pet. App. 14a. Reviewing its earlier decision on the appeal from the intervention proceedings, the court noted that respondents were not parties to the decrees and their claims did not accrue until "after the decrees became effective and the challenged promotions were made." Pet. App. 15a. The Eleventh Circuit further added that there was no other factor justifying preclusion: "the individual plaintiffs [did not] have an identity of interest with a party to the consent decrees that they should be treated as parties for preclusion purposes." Pet. App. 15a. After carefully consid-

ering the time at which respondents' claims arose, its earlier decision precluding the BFA's attempt to intervene several weeks before the settlements were approved, and the voluntary nature of the affirmative action plan embodied in the consent decree, the Eleventh Circuit held that the respondents should not be bound by the consent decrees.[15]

Since the district court had incorrectly bound these respondents to the provisions of the decrees, hence limiting the scope of the trial, the Eleventh Circuit directed the district court to try plaintiffs' discrimination claims under the standards provided in *Johnson v. Transporation Agency*, 480 U.S. ___, 105 S.Ct. 1442 (1987) (Title VII), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (Constitution). Pet. App. 17a-19a. The court also stated that consideration of the defendants' conduct without giving any preclusive effect to the consent decrees is warranted under the facts of this case:

> The reasons for according a consent decree no more weight than a voluntary affirmative action plan when the consent decree is offered as justification for a race conscious employment decision are especially strong where, as here, vitally interested parties are not parties to the plan incorporated into the decree. The City Decree does contain a provision — paragraph 2 — that facially serves to protect the interests of nonminority employees. In light of the district court's interpretation of paragraph 2, however, that protection is illusory at best. The district court's interpretation of the City decree permits the City to make race conscious promotions without using *any* job-related selection procedure. Given the natural potential that such an arrangement will trammel the interests of nonminority employees, we are compelled to the conclusion that the district court should subject the consent decrees to heightened scrutiny under the second prong of the *Johnson* analysis when it tries the individual plaintiffs' claims.

[15]Judge Anderson filed a dissenting opinion which noted that while the employer should not be held liable if it believed it was complying with the decrees, he agreed with the opinion of the court to the extent that it permitted respondents to "challenge the consent decree prospectively and test its validity against the recent Supreme Court precedent." Pet. App. 24a.

Pet. App. 19a (emphasis in original). The other issues raised by respondents on appeal were therefore not considered by the Eleventh Circuit.

This Court limited its grant of certiorari to the narrow question of whether an action by a nonparty which implicates a consent decree entered in settlement of prior discrimination litigation must be dismissed as an "impermissible collateral attack."[16]

SUMMARY OF THE ARGUMENT

Throughout years of litigation — including extensive discovery, a complex trial, and two appeals — respondents have sought a meaningful opportunity to have their discrimination claims heard and considered by a federal court. Petitioners have continually sought to insulate themselves from liability claiming that their conduct was permitted by an affirmative action plan embodied in a consent decree, the validity of which they assert cannot be questioned. This Court granted *certiorari* to resolve the narrow issue of whether respondents may challenge the provisions of consent decrees which affect them and to which they are not parties in separate and subsequent litigation.[17]

[16]The petitioners' assertion in the question presented by each petition that respondents "had notice and an opportunity to be heard" is patently wrong and contrary to both the 1983 and 1987 decisions of the Eleventh Circuit in this litigation. Indeed, the Eleventh Circuit held that the BFA's participation at the fairness hearing was not sufficient to make it a party to the decrees and respondents did not "implicitly" consent to the decrees. This is akin to a finding that there was no waiver of an opportunity to be heard. Pet. App. 15a.

[17]The Court's grant of *certiorari* was limited to the identically worded first question in each of the three petitions. 101 L.Ed.2d 881 (June 20, 1988). This question is the identical question which the Court failed to resolve in the preceding Term in *Marino v. Ortiz*, 108 S.Ct. 586 (1988). While it was undisputed that the *Marino* petitioners intentionally eschewed an invitation to intervene, 806 F.2d 1144, 1147, as demonstrated at Part I(C), *infra*, the premise of the question presented in the instant case that respondents "had notice and the opportunity to be heard before entry of [the] decrees" of the sort necessary to adjudicate their constitutional and statutory rights is strongly contested and simply not true.

In addition, petitioners also sought review of the extent of any "extra protection" a consent decree might provide (Personnel Board pet. i), the

As nonparties, respondents are not bound by the consent decrees and are at liberty to challenge the illegal voluntary conduct of their employer. Whether such conduct was taken pursuant to a consent decree is, in our view, of little consequence since a consent decree merely embodies a voluntary affirmative action plan. *See Local No. 93 v. City of Cleveland,* 478 U.S. 501, 106 S.Ct. 3063 (1986).

Binding nonparties to the provisions of a consent decree which they or their privies had no part in making violates fundamental notions of due process. *Hansberry v. Lee,* 311 U.S. 31 (1940); *Parklane Hosiery v. Shore,* 439 U.S. 322, 327 n.7 (1979). It is without dispute that respondents were not parties or privies to parties to the Birmingham consent decrees and no decree party represented the interests of the nonminority employees. Pet. App. 15a, 105a. Indeed, the collateral attack bar advocated by petitioners has no foundation in the decisions of this Court. *See Ashley v. City of Jackson,* 464 U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of *certiorari*).

This case comes before the Court in a unique factual context. Intervention was sought *before* entry of the consent decrees by the Birmingham Firefighters Association ("BFA") and two individual firefighters. J.A. 774-776. The City successfully opposed intervention claiming the BFA members had no standing to contest decree requirements and their application to intervene was untimely. J.A. 534-552. The Eleventh Circuit upheld the denial of intervention finding that no prejudice should accrue to the nonminority employees because they were free to institute independent suits asserting the specific violation of their rights after their

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scope of the nonparties' right to challenge the decree (Arrington pet. i), and the propriety of the Eleventh Circuit's instructions to the district court on remand (Martin pet. i). This Court denied review of these matters which will not therefore be addressed in this brief.

In view of the limited basis upon which review has been granted, respondents will not address the propriety of the provisions of the consent decrees, the sufficiency of the record of discrimination in the consent decree litigation, nor the legality of the challenged conduct as addressed at Martin br. 3-6, 38-39. *See also,* Arrington br. at 10 ("[n]o question concerning the propriety of race-conscious relief is before the Court.").

cause of action accrued. Any earlier claims would have been premature and speculative. J.A. 149-161. Respondents filed those suits, and petitioners now claim respondents are again wrong — they should have perceived their interests during the pendency of the consent decree cases and intervened. Such a shifting of positions to deny any opportunity to contest conduct related to a consent decree has been described as a judicial pincer movement on the due process rights of nonparties to litigation. Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process,* 1987 Legal Forum 155 (1987). The law is clear that persons not parties to litigation do not have an affirmative duty to intervene in litigation to which they have not been joined by the existing parties. *Chase National Bank v. City of Norwalk,* 291 U.S. 431 (1933). Moreover, a judicial rule, created pursuant to Rule 24, F.R.Civ.P., which terminates respondents' claims before they accrue impermissibly alters the statute of limitations in a manner contrary to the provisions of 28 U.S.C. § 2072.

Even if there is a duty to intervene, before individual Title VII and Constitutional rights are altered, nonparties are, at a minimum, entitled to adequate notice and a meaningful opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 317 (1950). The Constitution places the burden to give adequate actual notice on the existing party through the exercise of "reasonable diligence." *Tulsa Professional Collection Services v. Pope,* 108 S.Ct. 1340 (1988). In this case, it is undisputed that petitioners made no effort to give individual actual notice to respondents, notwithstanding the fact that all were city employees when the decrees were approved. Through the exercise of reasonable diligence, individual notice by mail of the settlement and approval proceedings could easily have been provided. Moreover, the City's black employees were each mailed a detailed notice describing the consent decrees and the specific effect the decrees would have on Fire Service promotions together with a complete copy of the decree. Pet. App. 144a-147a. The statements published in the newspaper simply announced the filing of "a decree." Indeed, under

such circumstances, it is patently unfair for a court to terminate respondents' causes of action before they have accrued.

Petitioners argue that by permitting employers to negotiate consent decrees which will immediately nullify the rights of nonparties to file discrimination claims, they will further the objective of voluntary compliance with our nation's antidiscrimination laws. But, the collateral attack bar impermissibly strips nonparties of an adequate opportunity to assert their individual claims of unlawful discrimination. Permitting independent suits such as those filed by respondents furthers the important policy against the prospective waiver by others of the right of each individual to be free from unlawful discrimination. *See Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986); *Alexander v. Gardner Denver Co.,* 415 U.S. 36 (1974). Moreover, preservation of the right of nonparties to sue will discourage employers from impermissibly shifting the burden of the past discrimination to innocent unrepresented employees through the settlement process. *W. R. Grace & Co. v. Local 759,* 461 U.S. 757 (1983). Employers will remain free to embody settlements in consent decrees and gain the benefit of judicial enforcement and supervision, but still be accountable to their employees for the consequences of actions which are not permissible remedial efforts.

A public employer's race-based conduct should be subject to the strict and searching scrutiny of adversarial litigation by the aggrieved parties, rather than the cursory review of facial "reasonableness" which the fairness hearing held in this case provided. While it is laudable to advocate settlement, voluntary compliance, and repose for litigants, such goals cannot be achieved at the expense of unrepresented parties.

Respondents suggest that two alternative approaches to the issue at hand fairly protect the rights of unconsenting nonparties while permitting employers to use consent decrees to achieve lawful objectives.

First, parties to a proposed consent decree may join potentially-affected persons as parties to the litigation under the mandatory joinder provisions of Rule 19, F.R.Civ. P.

Through this procedural device nonparties will receive adequate notice of the proposed decree through service of process, and will thereby be fully informed that a court is about to enter a judgment which may affect their rights.

As an alternative, should the district court or decree parties not see fit to join the potentially affected third parties to the litigation under Rule 19, Congress has determined through legislation creating reasonable statutes of limitation that injured parties must file suit within a definite period of time from the date upon which their injury accrues. It makes sound, logical and legal sense for injured parties to seek redress after they are in fact injured rather than to require the filing of protective motions to intervene by persons who may never suffer injury. Indeed, it makes even more sense to require a hearing on the claims of some fifteen similarly situated firefighters rather than to require the intervention of hundreds of rank-and-file firefighters who have the right to apply for promotion to the position of Fire Lieutenant. Rather than precipitate duplicative and unnecessary litigation, the channeling of the claims of actually affected persons (as opposed to potentially-affected persons) into a single proceeding is a prudent use of judicial resources, limiting the volume of litigation, while still pursuing the right of unconsenting parties to a meaningful hearing upon the merits with respect to the alleged illegal conduct.

It is clear that in the context of this case, where intervention was sought before entry of the decree and denied, respondents are entitled to challenge decree related conduct in these proceedings. Respondents request this Court to reject the collateral attack bar advocated by petitioners.

ARGUMENT

I. BINDING A NONPARTY TO A JUDGMENT IS VIOLATIVE OF FUNDAMENTAL DUE PROCESS RIGHTS.

A. A Consent Decree Cannot Bind A Nonparty.

It is a settled rule of preclusion law that a judgment is only binding on a party or its privies. *Ashley v. City of Jackson,* 464

U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of *certiorari*).[18] This rule expresses a fundamental notion of due process which ensures that the courts, as the guarantor of the legal and constitutional rights of all citizens, fairly and impartially provide all persons with a meaningful opportunity to be heard. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 327 n.7 (1979); *Hansberry v. Lee,* 311 U.S. 32 (1940). There is no dispute that respondents are neither parties nor in privity with any parties to the consent decrees. Pet. App. 12a-13a, 105a. It follows that the consent decrees cannot and do not bind respondents and that they therefore ought to be free to sue a party to the decrees within the applicable statute of limitations.

In an effort to avoid this fundamental premise, petitioners claim that this Court should adopt the "no collateral attack" bar followed by some federal circuit courts,[19] though not the

[18]This rule dates back to the opinion of Chief Justice Marshall in *Davis v. Wood,* 1 Wheat. 6, 8-9, 4 L.Ed. 22 (1816) ("everyone should have his own day in court"). *See also Baldwin v. Hale,* 68 U.S. 223 (1864) ("parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified"); *Windsor v. McVeigh,* 93 U.S. 274 (1876); *Litchfield v. Crane,* 123 U.S. 549 (1887); *Hovey v. Elliott,* 167 U.S. 409 (1897).

[19]Since a collateral attack typically involves an attack upon a judgment by a party against whom the judgment was rendered, the term is a misnomer. *See* Kramer, *Consent Decrees and the Rights of Third Parties,* 87 Mich.L.Rev. — (forthcoming in Nov. 1988).

The collateral attack doctrine first received judicial recognition in *Black and White Children of the Pontiac School System v. School District,* 464 F.2d 1030 (6th Cir. 1972) (school desegregation case). Thereafter, it appeared in the context of employment discrimination suits. *Prate v. Freedman,* 430 F.Supp. 1373 (W.D.N.Y.), *aff'd,* 573 F.2d 1294 (2d Cir. 1977); *O'Burn v. Shapp,* 70 F.R.D. 549 (E.D.Pa.), *aff'd,* 546 F.2d 417 (3d Cir. 1976), *cert. denied,* 430 U.S. 968 (1977); *Dennison v. City of Los Angeles,* 658 F.2d 694 (9th Cir. 1981) (all collateral burdens on a consent decree are per se impermissible); and *Thaggard v. City of Jackson,* 687 F.2d 66 (5th Cir. 1983), *cert. denied sub. nom. Ashley v. City of Jackson,* 464 U.S. 900 (1983).

The majority of commentators have criticized the no collateral attack doctrine, finding little persuasive analysis to support it. *See* Comment, *Collateral Attacks on Employment Discrimination Consent Decrees,* 53 Chi.L.Rev. 147, 153 (1986) (rationales for *Thaggard* cases applied "haphazardly and with little explanation"); Kramer, *Consent Decrees and the Rights of Third Parties,* 87 Mich.L.Rev. (Nov. 1988) ("Courts that enforce the collateral attack bar have ignored its due process implications."); Cooper, *The*

Eleventh Circuit, which prohibits and excludes any lawsuit which implicates a consent decree entered into pursuant to a settlement of pending Title VII litigation.

This Court has already rejected the rationale that underlies the collateral attack doctrine. In *Hansberry v. Lee,* 311 U.S. 32 (1940), the Court refused on grounds of due process to preclude black plaintiffs from contesting a racially-restrictive covenant which had been held valid in earlier litigation, noting that:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States . . . prescribe. . . .

Id. at 40. Indeed, this rule has been consistently applied by this Court in a variety of contexts. *See Sam Fox Publishing Co. v. United States,* 366 U.S. 683 (1961) (Court upheld denial of intervention to contest provisions of government antitrust consent decree because nonparties would not be bound); *Blonder-Tongue Labs v. University Foundation,* 402 U.S. 313 (1971) (litigated antitrust case); *Sea-Land Services v. Gaudet,* 414 U.S. 573, 593 (1974) (admiralty wrongful death action); *McKinney v. Alabama,* 424 U.S. 669 (1976) (*in rem* obscenity proceeding); *W. R. Grace & Co. v. Local Union 759,* 461 U.S. 757 (1983) (E.E.O.C. conciliation agreement). *See also National Licorice Co. v. N.L.R.B.,* 309 U.S. 350, 366-367 (1940) (judgment in favor of the N.L.R.B. against an employer who contracted with individual nonparty employees in a manner violative of federal labor statutes did not affect the rights of such employees to enforce those contracts against employer); *Belknap v. Hale,* 463 U.S. 491, 510-512 (1983) (state action for

Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process, 1987 Legal Forum 155 (1987); Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties,* 1987 Legal Forum 103 (1987); Mengler, *Consent Decree Paradigms: Models Without Meaning,* 29 Boston Col.L.Rev. 291, 332 (1988) (failure to consider "third parties' claim on clean slate . . . violates due process").

misrepresentation not precluded by federal labor law). *Cf., Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867 (1984) (individual claims of class members not litigated in unsuccessful class action not barred).

In the context of employment discrimination litigation, this Court recently refused to preclude nonminority employees from seeking redress for discriminatory practices taken pursuant to court orders. *W. R. Grace & Co. v. Local 759,* 461 U.S. 757 (1983) (Title VII); *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986) (U.S. Constitution). *See also Local No. 93 v. City of Cleveland,* 478 U.S. 501 (1986) (claims of nonconsenting intervenors remain even after entry of consent decree). In addition, many appeals courts have also refused to bind nonparties to the provisions of consent decrees, both in the context of appellate review of attempts to intervene in consent decree litigation and in the context of decisions to allow collateral litigation to go forward.[20]

[20]*See United States v. Automobile Manufacturers Association, Inc.,* 307 F.Supp. 617 (C.D.Cal. 1969), *aff'd,* 397 U.S. 248 (intervention to block entry of a consent decree should be denied because proposed intervenors remained free to pursue their independent claims); *United States v. City of Jackson,* 519 F.2d 1147 (5th Cir. 1975) (Rule 24 intervention denied because courts should accord "little or no weight in the determination of the rights of persons not [a] party" to discrimination decrees); *Harmon v. San Diego County,* 477 F.Supp. 1084 (S.D.Cal. 1979) (nonminority held not bound by terms of a Title VII consent decree where he was not given notice and an opportunity to participate); *McAleer v. American Tel. & Tel. Co.,* 416 F.Supp. 435, 440 (D.D.C. 1976) (Gesell, J.) (consent decree made necessary by employer's discrimination is no defense to the claim of a faultless employee); *National Wildlife Federation v. Gorsuch,* 744 F.2d 963 (3rd Cir. 1984) (consent judgment does not bind a nonparty; nonparties have no duty to intervene); *Reeves v. Wilkes,* 754 F.2d 965, 971 (11th Cir. 1985) (intervention by whites, without notice of decrees, inappropriate; whites cannot intervene to challenge the decree because separate suit is the appropriate route; "By definition, a consent decree only binds those who consent, either expressly or impliedly"); *County of Orange v. Air California,* 799 F.2d 535 (9th Cir. 1986) (intervention to contest consent decree denied as untimely; however, denial of intervention does not preclude nonparty from taking other action; consent decree is a "negotiated settlement affecting only the signing parties"); *United States v. Allegheny-Ludlum Industries,* 517 F.2d 826, 845-46 n.21 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976); *Madison Square Garden Boxing, Inc. v. Shavers,* 562 F.2d 141, 143 (2d Cir. 1977) (consent judgment binds only consenting parties). *See also Samayoa by Samayoa v. Chicago Bd. of Education,* 807 F.2d 643 (7th Cir. 1986) (Easterbrook J., joined by Posner and Coffey, J.J., dissenting from denial of rehearing *en banc*) (consent decrees resolving discrimination claims do not bind strangers and may be challenged).

In this case, none of the traditional rules for precluding challenges by nonparties to consent decrees are applicable.[21] As previously stated, both the district court and the Eleventh Circuit held that neither respondents, nor their privies, are parties to the decrees. Pet. App. 12a-13a, 105a. While a nonparty might be bound if an existing party adequately represents its interests, *Montana v. United States,* 440 U.S. 147 (1979), the Eleventh Circuit has twice held that no party to the consent decree litigation adequately represented the interests of respondents. In the first appeal, the Eleventh Circuit stated that the "BFA members had no identity of interest with the City . . . From the beginning, the Board and City represented a wide range of occupations in the public sector and had different cost-benefit settlement interests, and incentives, from those of the BFA members." J.A. 155. The appeals court again stated in the decision below:

> [T]he record fails to indicate that the City mounted a vigorous defense to the allegations leveled against it before entering into settlement negotiations. Indeed, the district court never tried the independent claims against the City. Consequently, it is far from clear that the City in any way adequately represented the individual plaintiffs' interest in the events leading up to the entry of the decrees. Moreover, it is not clear that the plaintiffs and the City shared any identity of interest at all. The City's various interests in this dispute conceivably may have conflicted in part with the plaintiffs' single interest in preserving preexisting promotion opportunities. Indeed, the City's interests were antagonistic in that it had every reason to avoid a determination of liability and little reason to object to the promotional aspects of the settlement. The settlement did not require the City to make any additional promotions, but only to

[21]This case does not involve a special remedial scheme that expressly forecloses successive actions by nonparties. A legislative body may develop an appropriate procedural device which will allow courts and parties, consistent with the due process clause, to achieve finality in litigation. Bankruptcy, reorganization, and probate statutes provide such appropriate remedial schemes. This is not such a case.

> reallocate the promotions that it would have made in any event. In real terms, the relief contemplated by the decrees was to come not from the hands of the City, but from the hands of the employees who would have otherwise received the promotions. At the very least, the City was in the position of a disinterested stakeholder with respect to the contested promotions. Given the disparate interests of the City and the individual plaintiffs, it is clear that the City could not have served as an effective surrogate for the individual plaintiffs' interests when it negotiated the plan incorporated into the consent decrees. Accordingly, it would be impossible to conclude that these plaintiffs are in any way bound by those decrees.

Pet. App. 16a. Given the disparate interests of the employees and the parties to the consent decrees, the finding of the lower court that respondents cannot be bound as parties to the decrees is due to be upheld. *See also, Arizona v. California,* 460 U.S. 605, 650 (1983) (Brennan, J., joined by Blackmun and Stevens, J.J., dissenting) (nonparties not sufficiently represented by existing parties are not estopped).

B. There Is No Basis For A Theory Of Mandatory Intervention.

Petitioners seek to create a rule placing the burden of intervention on nonparties in litigation which may result in a consent decree adversely affecting their rights. Under petitioners' theory, if intervention is not sought in a "timely" manner, nonparties are precluded and effectively bound by any settlement decree entered in the litigation. This theory is flawed.

In *Chase National Bank v. City of Norwalk,* 291 U.S. 431 (1933), this Court held that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.* at 441. *See also National Licorice Co. v. N.L.R.B.,* 309 U.S. 350, 366-367 (1940); Comment, *Collateral Attacks On Employment Discrimination Consent Decrees,* 53 Chi.L.Rev. 147, 157 (1986) (mandatory intervention rejected in *Chase National Bank*). Given the undisputed fact that respondents are entitled to a hearing, they therefore had no duty to intervene.

Petitioners rely upon *Penn Central Merger and N & W Inclusion Cases,* 389 U.S. 486 (1968), to support their claim that respondents had an affirmative duty to intervene in the consent decree proceedings and that respondents should be forever precluded from contesting any action allegedly taken pursuant to the settlement embodied in the consent decree. Petitioners' reliance upon *Penn Central* is misplaced for several reasons.

First, the *Penn Central* litigation arose out of a unique program of massive congressionally-mandated reorganization of an uneconomical national railway system. *Id.* at 492-494. Congress, faced with the prospect of objection to reorganization by competing interests, provided a statutory framework to resolve potential challenges to the plan of reorganization through hearings by the Interstate Commerce Commission (I.C.C.), and limited judicial review of I.C.C. orders. The relevant statutes have since been repealed. *See* Transportation Act of 1940, 5 Stat. 898; 49 U.S.C. § 5. The potential scope of litigation seeking review of I.C.C. orders was so great that Congress saw fit to provide that "orders, writs, and process of the district courts may . . . run, be served and be returnable anywhere in the United States." 28 U.S.C. § 2231. Hence, in *Penn Central*, where suit had been brought before a three judge federal district court sitting in New York, the process of the court in that case ran throughout the nation. *Penn Central*, 389 U.S. at 505 n.4. Narrow judicial review of the proceedings before the I.C.C. was further effected by a waiver of possible objections upon grounds of improper venue by the United States. *Id.* Proceedings in other district courts were stayed, but not dismissed, in order to prevent a multiplicity of litigation regarding the I.C.C.'s merger and inclusion decision.

Second, the claims of all interested parties in *Penn Central* were considered *on the merits* by the Supreme Court. Various Pennsylvania interests objected to the merger order. The

City of Scranton and Milton J. Shapp filed complaints in the New York proceeding. *Id.* at 502. The Borough of Moosic filed suit in the Middle District of Pennsylvania. Scranton and Shapp then intervened in the Moosic action, which was stayed by the district court pending resolution of the New York cases. *Id.* at 503. After Scranton and Shapp failed to prosecute their New York complaints, despite warnings from the court, their claims were dismissed. *Id.* at 502. The New York court added that the claims were substantively of "no merit." *Id.* at 504-505. This Court held that Moosic's petition for mandamus was moot because the stay of the Pennsylvania proceeding had been dissolved. *Id.* at 503. The Court upheld the dismissal of Scranton and Shapp's New York complaint both on procedural grounds and "the lack of merit of their claims." *Id.* at 505.

In discussing further proceedings in the Pennsylvania case, the *Penn Central* Court refused to preclude further proceedings, finding that "Scranton, Shapp and Moosic may of course, seek such relief, if any, in that Court as may be available and appropriate in light of our decision herein." *Id.* at 506. The Court noted that, as parties to the New York case, Scranton and Shapp were precluded from relitigating the merits of the merger order. *Id.* at 505. Moosic was also deemed bound. Although it refused to join the New York case, its claims were identical to those of Scranton and Shapp, and those same claims had been litigated to a conclusion by Scranton and Shapp before both the New York court and this Court. *Id.* at 504-506. Implicit in the Court's decision is a finding that Moosic's interests were effectively represented by Scranton and Shapp in the New York court and that there was no need to duplicate the earlier proceedings in the district court and in appellate proceedings. This Court has held, of course, that a nonparty may be collaterally estopped when an existing party acts as the effective surrogate or privy of the nonparty. *See Montana v. United States,* 440 U.S. 147 (1979), and discussion at Part IA, *supra.* Clearly, Moosic's interests were identical to, represented by, and fully litigated before this Court by Scranton and Shapp.

Third, the scope of judicial review in *Penn Central* was

necessarily very limited. The three judge New York district court was not at liberty to reopen the proceedings of the I.C.C. Rather, judicial review was confined to a determination of whether the action taken by the I.C.C. could be supported by substantial evidence. Accordingly, Moosic could never be entitled to more than a cursory review of the merits of the I.C.C. merger order. The most Moosic could have hoped for would have been a determination of whether the I.C.C. had issued the merger and inclusion orders in the *Penn Central* case upon adequate evidence. As discussed above, both the New York district court and the Supreme Court found the objections to the merger to be without merit. *Penn Central,* 389 U.S. at 504-505.

Finally, litigation seeking judicial review of an I.C.C. order of the kind found in *Penn Central* is fundamentally unlike litigation by third parties seeking to challenge voluntary action taken pursuant to a consent decree. While Moosic's claims were litigated by parties with identical interests, the agreement challenged here stems from the voluntary action of parties with interests in conflict with those of respondents rather than the considered judgment of a court.[22]

Since the *Penn Central* and *Provident* decisions in 1968, this Court has emphasized that personal jurisdiction must be found to attach in order to bind a nonparty. During the following term, in *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100 (1969), the *Hansberry* principle was reaffirmed that "[i]t is elementary that one is not bound by a judgment in personam resulting from litigation to which he is not desig-

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[22]The reliance of petitioners' and their *amici* upon *Provident Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968) is without merit. There, this Court expressly declined to decide whether a nonparty could choose to relitigate in state court issues decided in a diversity action to which he was not a party. "We do not now decide whether such an argument would be correct under the circumstances of this case." *Id.* at 114. Similarly, reliance by the City on *Arizona v. California,* 460 U.S. 605 (1983) is erroneous. *Arizona* was an original jurisdiction case wherein this Court refused to reopen past decisions relying upon the doctrines of *res judicata* and collateral estoppel. The Court held the Indian Tribes were bound by its earlier findings because the United States had fully represented their interests. *Id.* at 626-627; *see also, id.* 650-652 (Brennan, J., dissenting).

nated as a party to which he has not been made a party by service of process. . . . " *Zenith Radio,* at 110.

Given the unique circumstances in *Penn Central,* it is clear that this Court has never accepted the principle of mandatory intervention.

C. Even If There Is A Duty To Intervene, Due Process Requires Adequate Notice And A Hearing.

Respondents never received adequate formal or actual notice of the pendency of the settlement. They received no invitation to intervene, and no appellate court has yet ruled upon the merits of either the facial validity of the decrees or the conduct of the City and Board in denying promotions to the respondents.

Petitioners' assertion that respondents should never be allowed to bring their claims before any court presents a uniquely unfair situation in the factual context of this case. The BFA and two firefighters sought to intervene *prior* to approval of the consent decrees. Petitioners successfully opposed intervention by would be objectors on grounds of timeliness and standing. Petitioners now paradoxically claim that respondents intentionally bypassed an opportunity to intervene and are thereby estopped. City Br. at 36-37. *See also* Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process,* 1987 Legal Forum 155 (1987). Respondents contend, however, that they have diligently sought to assert their rights at every opportunity.

1. *Adequate Notice Was Not Given.*

Though repondents are of the opinion that the parties to the consent decrees in this case were under a mandatory duty to join those nonparties whom they sought to bind by their proposed decree, see Part IV, *infra,* respondents submit that if intervention is required, then nonparties should, at a minimum, receive formal notice. The practical effect of the doctrine of mandatory intervention proposed by petitioners is that parties to a consent decree may obtain a consent

judgment from a court and make that judgment binding against all third parties. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 317 (1950) requires that in such circumstances, parties are entitled to the "best notice practicable." If a person's identity and whereabouts are known, the party seeking to bind another must mail or personally serve specific notice of the action. *Mullane,* 317-318.

In *Mullane,* this Court struck down a state statute permitting notice by publication to known beneficiaries in a proceeding for judicial settlement of trust accounts despite the fact that the trustee knew their identities and addresses. It made no difference that Mullane received actual notice of the proceeding and represented the interests of known beneficiaries. This Court held, at a minimum, individual notice by mail was required to be given to known interested parties. *Mullane,* 318-320.

Last term in *Tulsa Professional Collection Services v. Pope,* 108 S.Ct. 1340 (1988), this Court again upheld the duty to give adequate notice by mail to known interested parties. The *Tulsa* Court struck down an Oklahoma statute permitting notice by publication to known creditors in a state probate proceeding. The Oklahoma statute permitted notice by publication for 2 consecutive weeks in a local newspaper. The publication commenced after the state probate court opened the estate upon request of the executor or administrator of the estate. This Court found that when private parties trigger a state statute of limitations through commencement of judicial proceedings there is sufficient state action to implicate the Due Process Clause. In such circumstances, "due process is directly implicated and actual notice generally is required." 99 L.Ed.2d at 577. The party giving such actual notice bears the burden of "reasonably diligent efforts . . . to uncover the identities . . . " of those interested parties that are "reasonably ascertainable. . . . " *Id.* at 578. This Court held that if the interested nonparties "identity was known or 'reasonably ascertainable,' then termination of appellant's claim without actual notice violated due process." *Id.* at 579.

The notice must be sufficient to apprise nonparties of the nature of the decree-approval proceedings, the effect of failure to seek intervention, and the time limit for motions to intervene. Comment, *Collateral Attacks On Employment Discrimination Consent Decrees,* 53 Chi.L.Rev. 147, 160-161 (1986). Adequate notice must apprise the potentially affected nonparty of the procedure for resolving claims at a hearing so as to permit the objector to adequately prepare for the hearing. *Memphis Light, Water and Gas Division v. Craft,* 436 U.S. 1, 13-15 (1978).

No effort was made to give adequate formal notice in this case and it is without dispute that actual notice was not given.[23] The published statement made no mention of the goals and quotas for BFRS promotional positions, did not describe the nature of the proceedings at the fairness hearing, failed to advise the nonparties that they could seek to intervene or when they would be barred from doing so, and deceptively stated that the decree was designed to merely ensure "equal employment opportunities." Pet. App. 171a-174a. The loss that the employees who were denied promotions were to suffer is not made clear by the alleged "notice". More importantly, it is undisputed that all of the respondents were incumbent city employees during the decree-approval proceedings, and no notice was given by either hand delivery, mail or posting at the job site. The notice provisions of the decree made clear that only the black employees received actual notice. Pet. App. 141a-146a. To the extent that the consent decrees were to foreclose the claims of the City's nonminority employees, they were entitled to the same notice as that provided to the City's black employees.

In similar fashion to the notices by publication in *Mullane* and *Tulsa,* the published statement in this case was triggered by judicial action in the form of the district court's June 8,

[23]The theory of notice was not raised in the petitioners' appellee briefs in the Eleventh Circuit. Rather, petitioners only claimed that an adequate *hearing* was given in the form of the Fairness Hearing. *See,* Brief for Richard Arrington, Jr. and the City of Birmingham, at 26 (11th Cir.); Brief for Appellees-Cross Appellants John W. Martin, *et al.,* at 2, 23 (11th Cir.). As discussed in the text, the formal published statement was inadequate and there is no evidence in the record of actual notice to the respondents.

1981 order provisionally approving the consent decrees. The City argues that respondents should have realized that their interests would potentially be affected by the proposed decrees and that therefore they should have intervened in the consent decree proceedings. By the same token, however, the Board and City, equipped with the numerous lawyers who had negotiated the decrees, through reasonable diligence should have equally realized that the City's existing nonminority employees would be affected by the decrees and ascertained their identities and addresses through the City's payroll records. Hence, respondents should have received the best possible notice in person or by mail. Indeed, the *Mullane* and *Tulsa* decisions require notice by mail to known and interested persons — regardless of whether those persons are aware of the proceedings.

In addition to petitioners' use of a defective mode of providing notice, the parties to the consent decrees crafted a deceptively vague notice. The notice mailed to each black employee included a copy of the entire consent decree together with a detailed summary of the specific goals and quotas to be entered for the various job classifications in the City employment structure including the fact that interim annual and long-term goals for the position of Fire Lieutenant were to be included in the decree. Pet. App. 186a. The published notice merely advised "interested persons" that the City had entered into a decree which included unspecified "goals" designed to "correct for the effect of any alleged past discrimination and to ensure equal employment opportunities for all . . . " Pet. App. 174a. If the parties to the decree realized that the nonminority employees were "interested persons," and they could hardly fail to do so, then they could and should have provided a notice to respondents similar in detail to that provided to the black employees.

The published statement failed adequately to inform respondents of the required steps necessary to properly protect their rights. The notice simply stated that the district court would hear objections on August 3, 1981 at the federal courthouse. Notice was not given that in order to fully protect their right of participation, respondents would have

to retain counsel, move to intervene by a certain time, and take action other than simple lodging of objections or they would be forever barred.

The parties to the decrees should have recognized their duty to provide the best notice practicable to each respondent. Such notice should have been mailed to each respondent as all were city employees at the time, and the City was aware of their identities and addresses.[24] *See Armstrong v. Marizo,* 380 U.S. 545, 550 (1965) (failure to give a known interested party individual notice of judicial "proceeding violated the most rudimentary demands of due process"; the opportunity to object "must be granted at a meaningful time and in a meaningful manner"); *Boddie v. Connecticut,* 401 U.S. 371, 377-378 (1971); *Grannis v. Ordean,* 234 U.S. 385, 395 (1913) (fundamental requisite of due process of law is the opportunity to be heard).

2. *No Adequate Hearing Was Provided.*

Petitioners cannot avoid the requirement of notice in this case by claiming that respondents received an adequate opportunity to be heard at the fairness hearing. A fairness hearing does not provide nonparty objectors with an adequate opportunity to be heard. *See,* Comment, Collateral Attacks on Employment Discrimination Consent Decrees, 53 Chi.L.Rev. 147, 181 n.139 (1986) (use of a fairness hearing to dispose of nonminority claims is the most extreme view). The fairness hearing held in this case by the district court did not provide objecting parties with the benefits normally accorded to parties in litigation. Thus, the objectors were not able to engage in discovery, could not call witnesses or offer evidence, and, most importantly, could not appeal from the proceedings of the district court. Indeed, despite over seven years of continuous litigation, no appellate court has ever

[24]As in *Tulsa,* there is no evidence in the record that the individual respondents received *actual* notice of the decree approval proceedings. The decrees made no provision for individual notice to nonminority employees. Nor is there any evidence that the individual respondents were aware of the pendency of the lawsuit. In fact, not all respondents had been hired at the time the suits were filed in 1974 and 1975. J.A. 382.

addressed the validity of Birmingham's plan, either on its face or as it applies to the respondents.

Respondents suggest that the fairness hearing process, whereby nonparties are given the opportunity to voice their concerns through objections, does not rise to the level of the full hearing necessary to terminate the substantive rights of nonparties. Rather, the fairness hearing is much like the predeprivation conference in *Cleveland Bd. of Education v. Loudermill,* 470 U.S. 532 (1985) where the charged employee is given the right to appear before the decisionmaker to coax, object and respond to the proposed deprivation, but not call witnesses or cross-examine those of the employer. Indeed, *Loudermill* provided that *after* a deprivation the employee is entitled to a full hearing. Employees who are denied a promotion on the basis of race are certainly entitled to no less. Respondents' suits are akin to the full post deprivation hearing required by *Loudermill.*

3. *Intervention Was Sought By Nonminorities And Denied.*

As stated above, the published statement did not apprise interested parties of the period of time within which intervention would be allowed or required. In any event, requiring intervention within 43 days of the publication of notice, as in this case,[25] is an unconstitutionally short period of time within which to require interested parties to intervene.

The *Martin* petitioners claim that intervention would have been timely and appropriate had it been sought before the fairness hearing.[26] While they never have demonstrated any prejudice by the one day delay, a requirement of intervention within a narrow window of some 43 days is clearly contrary to minimum standards of due process, particularly when the limitations period is triggered by an unknown

[25]The publication was completed on June 21, 1981. J.A. 697. The fairness hearing was held 43 days later on August 3, 1981. J.A. 727.

[26]*See,* Martin Petitioners' Reply Brief In Support Of Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit, 5 n.3. This position is quite different from that advanced by the Martin petitioners in the first appeal. They argued there that the proposed intervenors were seven years too late and lacked any litigable interest to

judicial action rather than actual injury to the party entitled to receive notice. *See Tulsa Professional Collection Services v. Pope,* 108 S.Ct. 1340 (1988). A motion to intervene was made on the forty-fourth day following publication of the "notice" and seventeen days *before* final approval of the decrees. Given the lack of any announced procedure for evaluating timeliness, the attempt to intervene was clearly permissible if movants were to be deemed bound by the decrees.

The City claims intervention during the approval proceedings would still have been untimely. The City advocates imposing a burden on nonparties to intervene as soon as they learn of the *pendency* of discrimination litigation involving their employer. City Br. at 22, 36. Petitioners must concede that no notice was given to the employees of the pendency of the action and there is no evidence that the individual respondents were aware of the pendency of the *Jefferson County* litigation. The City's own Fire Chief did not even know that the litigation might involve BFRS promotions. J.A. 452. As demonstrated in Part IV, *infra,* placing a burden on respondents to intervene shortly after the cases were filed is clearly unreasonable.

D. Federal Courts Lack the Power to Alter Substantive Rights Through the Collateral Attack Bar.

The collateral attack bar alters the period of time established by Congress for the assertion of discrimination claims. In Alabama, Title VII charges of discrimination must be filed with the Equal Employment Opportunity Commission within 180 days of the act of discrimination. 42 U.S.C. § 2000e-(5)(e), (f). The statute of limitations for a claim

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permit intervention. *See,* Brief of John W. Martin, *et al., United States v. Jefferson County,* No. 81-7761 (11th Cir.); *see also* J.A. 180. The City petitioners continue to maintain that respondents should have sought intervention when *Jefferson County* was filed, some seven years earlier, and that the intervenors lacked standing to intervene. J.A. 535-536. Although we think both arguments are erroneous, the difference illustrates the guesswork attendant to the determination of the appropriate time for intervention.

under the Fourteenth Amendment is governed by 42 U.S.C. § 1988. The petitioners' position that the only time respondents could have asserted their claims is governed by the timeliness requirements of Rule 24 is thus tantamount to a judicial modification of the statute of limitations. In addition, to require the assertion of discrimination claims prior to their accrual is an alteration of the statutory provision that the limitations period commences when "the alleged unlawful employment practice occurred." 42 U.S.C. § 2000-e(5)(e). *See also Delaware State College v. Ricks,* 449 U.S. 250 (1980).

It is quite clear, however, that courts lack the authority to revise these substantive rights. Congress has required that the Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive rights . . . " 28 U.S.C. § 2072. By reducing the statute of limitations for assertion of discrimination claims through requiring "timely" Rule 24 intervention, courts alter substantive rights of nonparties. *See* Kramer, *Consent Decrees and the Rights of Third Parties,* 87 Mich.L.Rev. ___ (Nov. 1988); *see also* Comment, *Collateral Attacks On Employment Discrimination Consent Decrees,* 53 Chi.L.Rev. 147, 164 (1986) (federal courts lack the power to develop a system of mandatory intervention). Although we think there is no warrant for this alteration, the judgment whether there is must be made by Congress. It depends on facts not readily available to the courts, such as the cost to third parties from foreclosing claims due to the shortened period of intervention and the benefits to parties and the courts in terms of settlement. More importantly, it calls for a value judgment with respect to competing interests — the substantive rights of third parties versus the procedural benefits to parties.

Beyond that, a court rule that requires assertion of claims before they mature is clearly an improper alteration of respondents' substantive rights and contrary to the notion that "the limitation periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Delaware State College v. Ricks,* 449 U.S. 250, 262 n.16 (1980). It is submitted, therefore, that since the respondents filed suit within the limita-

tion period prescribed by Congress, their claims are due to be heard.

II. RESPONDENTS' SUITS ARE CONSISTENT WITH THE POLICIES OF TITLE VII AND THE CONSTITUTION.

Given the voluntary nature of a consent decree, the strong public policy of Title VII and the Constitution that individual rights cannot be waived by others, and the policy favoring the policing of all race-based conduct, there is no justification for giving the Birmingham consent decrees any more preclusive effect against third parties than one would give a voluntary affirmative action plan.

A. Consent Decrees Are Voluntary Devices Entitled To No More Preclusive Effect Than Unilaterally Adopted Affirmative Action Plans.

Petitioners' claim that the Eleventh Circuit's rule permitting nonparties to litigate the validity of conduct taken pursuant to a decree will signal the death knell for consent decrees and voluntary efforts to remedy past employment discrimination. On the contrary, nothing will prohibit an employer from voluntary efforts to remedy past discrimination in a *lawful* manner. Employers will continue to be free to adopt lawful affirmative action plans and embody those plans in a consent decree where appropriate. In addition, embodying their settlement in a consent decree is advantageous for a number of other reasons — mostly relating to enforcement of the decree as between signing parties. *See,* Part III, *infra.* Accordingly, since these benefits remain even without the collateral attack bar, petitioners are wrong to assert that consent decrees will suddenly become useless.

To treat a consent decree in the same manner as any other voluntary plan is consistent with this Court's recognition of the wider latitude afforded parties in crafting consent decrees over that allowed courts in ordering a remedy in a litigated proceeding. *Local No. 93 v. City of Cleveland,* 478 U.S. 501, 92 L.Ed.2d 405 (1986) (Court rejected union's claim

that a district court lacked the authority to enter a consent decree providing relief broader than that which the court might require under § 706(g)). *See also,* Mengler, *Consent Decree Paradigms: Models Without Meaning,* 29 Boston Col.L.Rev. 291 (1988). In the employment discrimination context, as in the antitrust field, "the voluntary nature of a consent decree is its most fundamental characteristic." *Local No. 93, supra,* 92 L.Ed.2d at 423. *See, United States v. ITT Continental Baking Co.,* 420 U.S. 223, 235-237 (1975); *United States v. Armour & Co.,* 402 U.S. 673 (1971); *Hughes v. United States,* 342 U.S. 353 (1952); *United States v. Atlantic Refining Co.,* 360 U.S. 19 (1959). "Most importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was based, that creates the obligations embodied in a consent decree." *Local No. 93,* 92 L.Ed.2d at 423-424. "[T]he parties' consent animates the legal force of a consent decree." *Id.* at 425.

Since consent decrees, while bearing the form of judgments, are essentially voluntary contractual devices, this Court should not clothe consent decree parties with whatever immunity may flow from a court-imposed judgment entered after a finding of liability. "[T]he fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the ground that it violates § 703 of Title VII or the Fourteenth Amendment." *Local No. 93,* 92 L.Ed.2d at 426. Just as consent decrees are not the sort of "orders" subject to the limitations of § 706(g), they are not the sort of orders of a court that might be entitled to preclusive effect.

Given these voluntary attributes of a consent decree, this Court held in *Local No. 93* that "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement. A Court's approval of a consent decree between some of the parties, therefore, cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." 92 L.Ed.2d at 428. While *Local No. 93* arose in the context of intervention

by a union, it makes little sense to have a different rule foreclosing unconsenting nonparties from raising their individual claims through timely lawsuits heard by the same court and judge having jurisdiction over the consent decrees. The same analysis that led the Court to conclude that a consent decree could not alter or modify the *substantive* rights of third parties, supports the conclusion that it cannot alter their *procedural* rights. Indeed, Justice O'Connor emphasized this point by stating that "nonminority employees . . . remain free to challenge the race-conscious measures contemplated by a proposed consent decree as violative of their rights under § 703 or the Fourteenth Amendment." *Id.* at 429 (O'Connor, J., concurring). *See also Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561, 589 n.4 (1984) (O'Connor, J., concurring) ("The policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees. . . . ").

B. The Collateral Attack Bar Improperly Encourages Employers To Shift The Costs Of Their Alleged Illegal Conduct To Innocent Employees.

Title VII and the Constitution both embody strong policies recognizing an individual's right to not be treated differently on the basis of race. Since that right cannot be prospectively waived by others, it makes little sense to hold that a voluntary consent decree precludes third party discrimination claims before they even accrue. To be sure, the Court has treated discrimination claims by nonminority plaintiffs differently than minority claims. *See Steelworkers v. Weber,* 443 U.S. 194 (1979); *Regents v. Bakke,* 438 U.S. 265 (1978). However, within the contours of the law as thus defined, nonminority plaintiffs are entitled to the same opportunity to protect themselves as minority plaintiffs. Their right to be free from what this Court has recognized as unlawful discrimination is no less important. Yet, the collateral attack bar encourages employers to waive the rights of their nonminority employees by shifting the costs of alleged past discrimination to them through affirmative action. Hence, it makes it more difficut for third parties to prove that the affirmative action

agreed to in negotiations to which the third parties were not invited goes too far and violates their rights. This is inconsistent with recent refusals by this Court to bind nonparties to the terms of voluntary affirmative action efforts which have become the subject of court orders. *W. R. Grace & Co. v. Local 759, Rubber Workers,* 461 U.S. 757 (1983) (Title VII); *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986) (Constitution).

In *Grace, supra,* the employer negotiated a conciliation agreement with the E.E.O.C. designed to remedy past discriminatory practices. The union representing the employees was invited by the Commission to participate in the negotiations, but declined to do so. *Id.* at 759. The employer and the E.E.O.C. signed a conciliation agreement dated December 11, 1974 and thereafter laid off more senior males pursuant to the provisions of the conciliation agreement but contrary to the contractual rights of the employees. *Id.* at 760-761. The union's first suit was unsuccessful in the district court, which ordered the agreement enforced, and the layoffs took place. *Id.* at 761. Two years later the district court's decision was reversed by the Fifth Circuit Court of Appeals. *Id.* at 762. The males were reinstated to their jobs and filed grievance claims for backpay which were granted following arbitration. *Id.* at 762-764. The employer filed a second suit claiming it should not be liable for backpay because it complied in good faith with the conciliation agreement and injunction.

This Court rejected the employer's claims, noting that by voluntarily entering into the conciliation agreement with the E.E.O.C. without the consent of the union the employer was "cornered by its own actions," and was in a "dilemma . . . of [its] own making," *id.* at 767, 770. Thus, the Court held the employer could not avoid liability to its innocent employees despite the fact that its conduct was mandated by the conciliation agreement and a district court injunction ordering compliance with the conciliation agreement. This Court considered and rejected the arguments petitioners now make here that the duty to obey injunctions justified such conduct and required that the employer bear the

economic burden for its past discriminatory conduct:

> Obeying injunctions often is a costly affair. Because of the Company's alleged prior discrimination against women, some readjustments and consequent losses were bound to occur. The issue is whether the Company or the Union members should bear the burden of those losses . . . By entering into the conflicting conciliation agreement, by seeking a court order to excuse it from performing the collective-bargaining agreement, and by subsequently acting on its mistaken interpretation of its contractual obligations, the Company attempted to shift the loss to its male employees, who shared no responsibility for the sex discrimination. The Company voluntarily assumed its obligations under the collective-bargaining agreement and the arbitrator's interpretations of it. No public policy is violated by holding the Company to those obligations, which bar the Company's attempted reallocation of the burden.

Id. at 770. Similarly, the Court rejected the argument that the policy in favor of voluntary compliance justifies the employer's abrogation of the contract rights of unconsenting employees. *Id.* at 771. While no formal collective-bargaining agreement is implicated in this case, respondents have enforceable contractual rights under the state civil service statutes,[27] as well as rights under Title VII and the Fourteenth Amendment. *See, McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). Respondents' individual Equal Protection and Title VII rights are just as important as the enforcement of a private sector collective-bargaining agreement. Given the Court's holding that the union must be able to enforce its contractual rights, despite its knowing

[27]Respondents have enforceable rights under the state merit system statute to promotions based on test scores and seniority points without regard for race, which have been unilaterally abrogated by the defendants. J.A. 434, PX 1, R1-27. The state courts have determined that these rights are akin to enforceable contract rights. *See, City of Birmingham v. Lee*, 254 Ala. 237, 48 So.2d 47 (1950); *Ex parte Bracken*, 262 Ala. 402, 82 So.2d 629 (1955); *Anderson v. Mullins*, 281 Ala. 609, 206 So.2d 856 (1967); and *City of Birmingham v. Walker*, 267 Ala. 150, 101 So.2d 250 (1958) ("laws governing the City [of Birmingham] and its employees constitute the contract of the City with [the employees]"). Respondents included state law claims in their complaints. Pet. App. 110a-116a; J.A. 93-99, 130-134.

rejection of the invitation to join the E.E.O.C. mediation process, respondents in this case should not be precluded when every effort to intervene was met with opposition from the consent decree parties.

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), this Court considered the validity of a "remedial" layoff plan despite the fact that the plan was part of a union contract and the public employer had been ordered by a court to comply with the plan. *Id.* at 270-272. The *Wygant* petitioners filed suit claiming their Constitutional rights had been violated by race-based layoffs mandated by a collective-bargaining agreement which had been ordered to be enforced in earlier litigation. The plurality rejected the notion that Wygant was bound by her union's contract:

> Of course, when a State implements a race-based plan that requires such a sharing of the burden, it cannot justify the discriminatory effect on some individuals because other individuals had approved the plan. Any "waiver" of the right not to be dealt with by the government on the basis of one's race must be made by those affected. . . . The Constitution does not allocate constitutional rights to be distributed like bloc grants within discrete racial groups; and until it does, petitioners' more senior union colleagues cannot vote away petitioners' rights.

Id. at 281, n.8. *See also, id.* at 318 (Stevens, J., dissenting) (noting the "procedural inadequacy" of set aside in *Fullilove* and comparing it to *Wygant*).

The lesson of *Wygant* and *Grace* is consistent with underlying policy of Title VII and the Constitution that each person has an individual right to freedom from discriminatory practices which cannot be prospectively waived by third parties. This is all the more true in view of *Local No. 93*'s rules based on the voluntary nature of a consent decree and the limited rights of unconsenting third parties to block entry of a consent decree. While *Alexander v. Gardner-Denver Co.*, 415 U.S 36 (1974), recognized the policy of Title VII to encourage voluntary settlement of claims before the E.E.O.C., this Court also recognized that "there can be no prospective waiver of an employee's rights under Title VII. . . . Title

VII's strictures are absolute and represent a congressional concern that each employee be free from discriminatory practices." *Id.* at 51. *See also, Connecticut v. Teal,* 457 U.S. 440, 453 (1982) ("Section 703(a)(2) prohibits practices that would deprive or tend to deprive '*any individual* of employment opportunities.' "); and *E.E.O.C. v. Safeway Stores,* 714 F.2d 567 (5th Cir. 1983).

In view of these policies against waiver by others of the right to be free from discrimination and the impropriety of shifting the cost for illegal conduct to innocent third parties, there is no justification for providing a voluntary consent decree with any more preclusive effect than that given a voluntary affirmative action plan.

C. The Collateral Attack Bar Hinders The Policing Of Affirmative Action Plans.

Petitioners seek to invoke the collateral attack bar to insulate themselves from all claims contesting conduct allegedly taken pursuant to an approved consent decree. By refusing to hear the claims of nonparties challenging the lawfulness of decree-related conduct, the courts are avoiding the duty to carefully police remedial race-based conduct.

The adoption of an allegedly valid plan is only the first step in the remedial process. The plan must be implemented carefully. Facial validity does not ensure against conduct that, although within the letter of the plan, may be outside the permissible boundries of valid affirmative action. *See Fullilove v. Klutznik,* 448 U.S. 448, 480-482 (1980) (adoption of a prospective remedial plan that "functions in the manner of an injunctive decree" does not foreclose later challenges to "specific applications of the program" as unconstitutional); and *South Florida Chapter of the Associated General Contractors v. Metropolitan Dade County, Florida,* 723 F.2d 846 (11th Cir.), *cert. denied,* 469 U.S. 871 (1984) (cautioning against conclusory use of race in implementation of a facially valid plan).

The policy favoring judicial policing of plans is especially important in a case such as the present where, given the manner in which the City decree was implemented, the provisions of the decree designed to protect against tram-

melling were deemed "illusory at best" by the Eleventh Circuit. Pet. App. 19a.

Through the collateral attack bar, petitioners seek to isolate themselves from accountability after approval of a consent decree. The consent decrees at issue here are merely a defense to respondents' discrimination claims. Pet. App. 82a-83a; J.A. 130-137. The real issue is the discriminatory *conduct* of the employer. By refusing to hear respondents' claims, the petitioners are no longer accountable for their conduct.[28]

III. RESPONDENTS' SUITS WILL NOT UNDERMINE THE ACCEPTED GOALS WHICH CONSENT DECREES SEEK TO FURTHER.

The *Local No. 93* Court opined that consent decrees provide litigants with several benefits through built in judicial enforcement mechanisms which private contracts lack:

- A consent decree is often a complicated document designed to be carried out over a period of years with the benefit of continuing oversight and interpretation by the court.
- Enforcement by decree parties is easier because it will be unnecessary to prove facts that have been previously established and a court has "a more flexible repertoire of enforcement measures" than private parties.
- " '[I]t is . . . easier to channel litigation concerning the validity and implications of a consent decree into a single forum — the court that entered the decree — thus avoiding the waste of resources and the risk of inconsistent or conflicting obligations."

92 L.Ed.2d at 424, n.13, *quoting* Brief for National League of Cities, *et al.* as *Amicus Curiae*, 25. *See also,* Kramer, *supra*; Mengler, *Consent Decree Paradigms: Models Without Meaning,* 29 Boston Col.L.Rev. 291, 327-336 (1988). To permit re-

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[28]It is no answer to claim that the district court or the United States is the guardian against abuse of decree-embodied affirmative action plans. As demonstrated by this case, a district court is inclined to protect the decree it previously entered and the United States, as a party to the decree, has different interests than those of nonparties.

spondents' claims to be heard on the merits will not undermine any of these goals. Moreover, the district court's consolidation of these suits is consistent with the common notion of the foregoing points that all litigation concerning consent decrees is best channeled to the court and judge which initially entered the consent decrees. In such a case, objections based on comity and abstention fall away.

In this case there were several motions to consolidate or transfer cases to District Judge Pointer. The first, filed by some respondents on August 4, 1983, sought consolidation of these claims with the consent decree cases. J.A. 129.[29] A series of motions were thereafter filed by petitioners seeking transfer of cases to Judge Pointer or consolidation with other cases. Respondents opposed transfer and consolidation without an agreement between the judges. Transcript of March 30, 1984 hearing, 4-7. After a period of several months, the cases were all consolidated before Judge Pointer in a single master file. J.A. 207, 218.

Once these cases were channeled into a single forum, any risk of inconsistent judgments and duplicative litigation dissipated. Moreover, as illustrated in this case, the fears on the part of petitioners of inconsistent judgments are unjustified given the tools available to channel related federal litigation into a single federal forum. While most litigation pertaining to a single consent decree will be filed in the same district as that in which the decree was entered, transfer is available to ensure that any case filed in another district is

[29]No ruling was ever entered on the motion; however, Judge Pointer stated that he viewed consolidation with the consent decree case inappropriate due to the voluminous record in the old case and the filing of a separate suit was "to some degree advantageous." J.A. 118.

While repsondents and petitioners both moved to consolidate some of these cases with the consent decree case, Judge Pointer and Judge Acker both denied consolidation. J.A. 129, 144; PX 11, R1-29 (entry of Nov. 29, 1983, motion to consolidate reverse discrimination case and consent decree case denied by Judge Pointer); Transcript of March 30, 1984 hearing, 3-4. *See also* PX 11, R1-29 at Nov. 4, 1983 entry (Opposition of Martin petitioners to post-judgment application to intervene in consent decree case). Should this Court take the view that respondents' claims should be heard as a part of the consent decree litigation, it may direct the district court to consolidate the cases on remand.

transferred to the court which entered the decree. 28 U.S.C. §§ 1404(a), 1631. Similarly, consolidation under Rule 42 and cooperation among the judges will resolve any risk of inconsistency or duplication.

Petitioners also argue that the collateral attack bar is essential to further the policy of encouraging settlements. While this policy is important, their means is an improper way of advancing it. In effect, petitioners argue that it is necessary to make it harder for third parties to challenge consent decree conduct because their challenges may interfere with the enforcement process. Petitioners also suggest that settlement is advanced if third party challenges are heard sooner rather than later. But this concern may be fully vindicated by their joining potential third parties — at least those who are known to them. Their argument for placing the burden to intervene on third parties is really nothing more than an attempt to preclude third parties by obtaining an effective bar before the third parties act. In any event, making it harder for third parties to protect *their* rights is an improper means to facilitate settlement by other parties because there is no basis for preferring the rights of parties to the decree to the rights of third parties. A still better solution, from petitioners' viewpoint, would be to hold that third parties cannot even intervene, that they are stuck with whatever settlement the parties reach. This would obviously be improper. We submit that the watered-down version of this proposal embodied in the collateral attack bar is equally improper. *See* Kramer, *supra.*

IV. IF NONMINORITIES ARE TO BE BOUND BY A PROPOSED DECREE, THE DECREE PARTIES SHOULD BE REQUIRED TO MANDATORILY JOIN NONPARTIES, AND, WITHOUT JOINDER, THE ELEVENTH CIRCUIT'S RULE PERMITTING RESPONDENTS' SUITS IS A REASONABLE PROCEDURAL DEVICE DESIGNED TO ENSURE DUE PROCESS.

Respondents submit that burdening the individual respondents with the duty to intervene in the course of the

Jefferson County litigation is unreasonable. The questionable standing of the individuals to participate and their uncertainty about whether they need to bear the expenses of litigating mean that third parties will often discover that their rights have been compromised but that it is already too late to move to intervene. Petitioners claim the collateral attack bar saves judicial resources and litigation costs. On the contrary, the rule advocated by petitioners will encourage protective and often unnecessary intervention applications which will unduly expand the breadth of discrimination litigation. In fact, under petitioners' proposed rule, every employee of every employer sued for race discrimination may be placed in the position of having to hire counsel to intervene to protect his or her position in the workforce. Such a burden has never been placed on strangers to litigation. *See, Chase National Bank v. Norwalk,* 291 U.S. 431, 441 (1933) ("law does not impose . . . the burden of voluntary intervention"). *See also, Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867 (1984) (individual unlitigated claims of class members not precluded despite the fact that other class members intervened to assert individual claims).

In order to have standing, a party must have a recognizable interest which is traceable to the defendant's allegedly unlawful conduct. *Allen v. Wright,* 468 U.S. 737 (1984); *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91 (1979). The rules of Article III standing apply to intervenors as well as original parties to the litigaton. *Diamond v. Charles,* 476 U.S. 54 (1986).

The City of Birmingham has some 3,000 employees. Over 600 are BFRS employees. It is wholly unrealistic to require each individual BFRS employee to take notice in 1975 through newspaper stories of the pendency of litigation, to learn that the litigation involves rights to promotional positions rather than hiring discrimination, to foresee that their employer will settle rather than litigate and that they will be the ones to bear the burden of that settlement through implementation of the quotas. Such an individual's interest in the litigation would certainly be speculative at best. *See* Cooper, *supra.*

Similarly, in 1981, it was unreasonable to require hundreds of BFRS employees to seek to intervene in order to protect their right to a promotion which they might decide to seek in the future and which might be denied if they obtain a score high enough to be certified.[30]

The union also cannot act as the surrogate for the employees. It represents a broad spectrum of employees, black and white, officers and privates, those with seniority and those without, as well as those who intend to seek promotion and those who do not. J.A. 382-384, 548-549. *See Wygant, supra,* at 281 n.8.

Given the speculative nature in 1975 of the respondents' interest in the *Jefferson County* litigation, it is certainly unreasonable to place the burden on the individual nonminority employees of the City, not to mention persons who are not yet City employees, J.A. 382, to intervene in the litigation. *See Safir v. Dole,* 718 F.2d 475 (D.C.Cir. 1983) (Scalia, J.) (Safir's possible future reentry into the shipping business deemed too speculative to confer standing). Moreover, protective intervention adds to the high cost of litigation of the existing parties as well as subjects the intervenor to the possible assessment of attorney's fees if the defendant is ultimately deemed liable. *See, Diamond v. Charles,* 476 U.S. 54, 70 (1986); *Reeves v. Wilkes,* 754 F.2d 965 (11th Cir. 1985). Such costs and risks are simply too high to preserve the future rights of nonparties to object to a potentially illegal consent remedy.

Moreover, petitioners' claim that respondents should have intervened in *Jefferson County* contradicts the position which they took in the appeal from the intervention proceedings that Gray, Sullivan and the BFA lacked a litigable interest which would support intervention. In 1983, the City told the Eleventh Circuit that the appellants lacked standing. *See* J.A. 549 ("with respect to the promotional goals the Firefighters fail to show a sufficient direct and personal injury to its members"). Similarly, the Martin petitioners claimed the appellants lacked "standing to seek appellate review of the

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[30]Only a small portion of those passing the Fire Lieutenant's examination are ever certified. PX 23, R1-25.

consent judgments." Brief of John W. Martin, 23, *United States v. Jefferson County,* No. 81-7761 (11th Cir.).

Consent decree parties have an adequate remedy through joinder of nonparties under Rule 19, F.R.Civ.P. Such a mechanism clearly provides the nonparty with a full complement of due process safeguards by notice through a summons, a date certain after which default may be entered, the tools of discovery, the opportunity to be heard through a full evidentiary hearing, and, most important, the right to appeal any adverse decision. Just as the employer believes the nonparty should perceive its interest and intervene, so too may the employer perceive the interest of the nonparty and join the nonparty at the appropriate time. The employer has sophisticated counsel with knowledge of the proposed consent decree and the skills to perceive the potential interest of the nonparty while the nonparty has no counsel or intimate knowledge of the federal court proceedings.[31] Had Birmingham wished to bind the respondents to its settlement, it could have joined them under Rule 19 or refrained from opposing intervention. The fact that joinder will involve some cost should be of no consequence. *See,* Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties,* 1987 Legal Forum 103, 144-153. Given its opposition to intervention, the City should not now be allowed to complain. Each time a complex claim of discrimination is brought before the courts involving diverse and competing interests, there are significant costs in terms of the litigation expenses and liability exposure of the parties as well as the allocation of scarce judicial resources. If the City desires to engage in a settlement the cost of which some third party is likely to bear, it should pay the price of either joining those parties in the litigation or facing the claims of those third parties in the future. Shifting the entire cost of settlement to innocent third parties should not be permitted. As

[31]As in this case, consent decrees normally emerge "from a series of secret, informal negotiations . . . " Comment, *Consent Decrees and the Judicial Function,* 20 Catholic L.J. 312, 315 (1970). The employer's counsel, rather than unrepresented nonparties, clearly has superior knowledge of such proceedings.

Mayor Arrington has testified, the consent decree was "the best business deal [the City] had ever struck." J.A. 526. This Court should not countenance "business deals" at the expense of strangers to the litigation.

In ensuring the rights of respondents to due process, the Eleventh Circuit found that respondents' claims against their employer are due to be heard in the context of independent suits. Such a rule is a reasonable procedural device which certainly preserves the due process rights of respondents to have their claims heard. To the extent other courts devise procedural mechanisms which also ensure due process in the context of other cases, such procedures may also be deemed acceptable by this Court. *See* Kramer, *Consent Decrees and the Rights of Third Parties,* 87 Mich.L.Rev. ___ (Nov. 1988). However, since the Eleventh Circuit's approach is an acceptable means of protecting the due process rights of all parties, there is no reason for this Court to *prohibit* third party suits such as those filed by respondents. Moreover, respondents believe their suits are the preferable means of resolving these types of claims, in view of the ability of the court not only to consider the facial validity of a decree-embodied plan, but also the conduct of the parties in implementing the plan. *See, e.g., Johnson v. Transportation Agency,* 480 U.S. ___, 107 S.Ct. 1442 (1987) (goal should be flexible based on the availability of minorities in relevant labor pool at the time of the preferential promotion rather than fixed at the time the plan is adopted); *Fullilove v. Klutznik,* 448 U.S. 448, 480-481 (1980) (Court only approved facial validity of set-aside statute and did not foreclose future challenges on a case-by-case basis).

V. UNDER ANY OF THE PROPOSED RULES, RESPONDENTS SHOULD NOT BE BOUND BY BIRMINGHAM'S SETTLEMENT.

Under any of the varous rules proposed by the parties in this case, it is clear that respondents are entitled to have their claims heard, and that the consent decrees are not entitled to be given any preclusive effect. Respondents are not parties to the decrees, they were not joined under Rule 19, their

interests were not represented by others, and they did not bypass any opportunity to intervene.

The nonminority Birmingham firefighters sought to intervene several weeks prior to the entry of the 1981 consent decrees. The district court, at the insistence of the decree parties, denied intervention as untimely. The Eleventh Circuit upheld the denial of intervention holding that the claims of the individual firefighters had not accrued at the time of the approval of the decrees. The court emphasized, however, that individual firefighters who are subsequently harmed by the implementation of the decrees were free to file individual suits at a later date alleging the specific violation of their rights. J.A. 156-159. The City did not seek review by this Court of that decision. Certainly no "adequate" opportunity to intervene was bypassed on the facts of this case.

Moreover, no formal or actual notice sufficient to abrogate constitutional rights was provided to the respondents. While the respondents were all City employees during the settlement process, the City conducted its negotiations secretly and then refused to notify parties who were known by the City to be "interested" in the proceedings. To compound the matter, the City published a "notice" that deceptively misled the reader. At the same time, the City went to great lengths to mail a detailed notice to its black employees. On its face, the procedure for the provision of notice was inadequate given the differences in content and the method of service upon similarly situated employees.

A consent decree is merely a tool to effect the settlement of litigation. Consent decrees therefore have limited usefulness and effect. Parties who seek repose and finality would be better occupied by concentrating their efforts toward the construction of valid affirmative action plans and the careful implementation of those plans as opposed to the creation of devices to cut-off third party claims even before they accrue.

The race based conduct of a public employer must be carefully policed and must always be subject to a strict and searching scrutiny by the courts. To date, Birmingham has successfully avoided the scrutinous review of its decree and

its conduct in light of the standards laid down by the Constitution and Title VII. The district court's fairness hearing only determined whether the "settlement represents a fair, adequate and reasonable compromise of the issues between the parties to which it is addressed. . . . " Pet. App. 246a. Lower courts should no longer be allowed to avoid the claims of nonminorities who seek to question the validity of affirmative action plans embodied in consent decrees. Employers should no longer be permitted to saddle innocent unrepresented employees with the entire cost of the employers's past discrimination. At a minimum, the employer should be required to pay damages to the nonminority employees harmed by the process of implementation of the settlement. *See, W. R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983). The collateral attack bar, coupled with a denial of intervention in the instant case, can no longer be tolerated in a society where due process is guaranteed to all citizens.

While the district court refused to evaluate the defendants' conduct as distinct from the question whether such conduct was mandated by the consent decrees, no appellate court has yet ruled upon the legality of the decrees or upon the conduct of the employer undertaken under the guise of the decrees. The Eleventh Circuit has wisely rejected a rule which would prohibit nonparties who are denied intervention from contesting the legality of race-based voluntary conduct in subsequent proceedings. The Eleventh Circuit's rule is consistent with the historic notion that nonparties are not bound by judgments to which they have not submitted either personally or through their privies.

While it is laudable to extoll the merits of negotiated settlements, voluntary compliance, and repose, such benefits cannot come at the expense of unconsenting parties. Respondents earnestly seek a day in court to contest the unconstitutional and illegal conduct of their employer without having to carry the millstone of their employer's settlement.

CONCLUSION

For the foregoing reasons, respondents Robert K. Wilks, *et al.* request that this Court affirm the decision of the United States Court of Appeals for the Eleventh Circuit and remand for further proceedings as mandated by the decision of the Eleventh Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN W. MARTIN, ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

RICHARD ARRINGTON, JR., ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether individuals may be barred from challenging employment-related actions taken under a consent decree entered in a Title VII suit, where the individuals were neither parties to nor intervenors in the action and did not consent to the terms of the decree.

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Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. (1988) (forthcoming) 24, 26
Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. Chi. Legal F. 103 ..... 20, 26
McCoid, *A Single Package for Multiparty Disputes*, 28 Stan. L. Rev. 707 (1976) 23
Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630 (1978) 21
C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*:
Vol. 15 (1st ed. 1976) 13, 23-24
Vol. 18 (1st ed. 1981) 12-13, 14, 18, 24, 25
7A C. Wright, A Miller & M. Kane, *Federal Practice and Procedure* (2d ed. 1986) 22

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1614

JOHN W. MARTIN, ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

No. 87-1639

PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

No. 87-1668

RICHARD ARRINGTON, JR., ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-24a) is reported at 833 F.2d 1492. The district court's initial findings of fact and conclusions of law (Pet. App. 27a-66a) are reported at 39 Fair Empl. Prac. Cas. (BNA) 1431. The district court's additional findings of fact (Pet. App. 69a-76a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1987. Timely petitions for rehearing were denied on January 25, 1988 (Pet. App. 25a). The petition for a writ of certiorari in No. 87-1614 was filed on March 30, 1988; the petition for a writ of certiorari in No. 87-1639 was filed on April 1, 1988; and the petition for a writ of certiorari in No. 87-1668 was docketed as of March 31, 1988. The petitions were granted and consolidated on June 20, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. In January 1974, the Ensley Branch of the National Association for the Advancement of Colored People and seven black individuals filed separate class action complaints in the United States District Court for the Northern District of Alabama against the City of Birmingham (City), the Personnel Board of Jefferson County, Alabama (Board), and other local government officials (Pet. App. 3a-4a). The complaints alleged that the City and Board had engaged in racially discriminatory hiring and promotion practices in various public service jobs, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1981 and 1983 (Pet. App. 4a & n.3). In May 1975, the United States filed a similar

complaint against the City and Board, alleging a pattern and practice of discriminatory hiring practices against blacks and women (*ibid.*).

The district court consolidated the three cases and held a bench trial in December 1976 limited to the issue of the validity of police and firefighter entry-level tests used by the City and Board. In January 1977, the court found that the tests adversely affected black applicants and were not sufficiently job-related and thus held that the tests were discriminatory in violation of Title VII (Pet. App. 4a). See *Ensley Branch of the NAACP* v. *Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 (N.D. Ala. 1977), aff'd, 616 F.2d 812 (5th Cir.), cert. denied, 449 U.S. 1061 (1980).

In August 1979, the district court held a second trial concerning the validity of other testing and screening devices used by the Board. Before the court issued its decision, however, the parties entered into ultimately fruitful settlement negotiations. Pet. App. 4a-5a. In June 1981, the plaintiffs and the United States jointly entered into two consent decrees—one with the City (Pet. App. 122a-201a), and one with the Board (*id.* at 202a-235a). Although containing no admissions or adjudications of liability, the decrees provided "an extensive remedial scheme, including long-term and interim annual goals for the hiring of blacks as firefighters and the promotion of blacks to the position of fire lieutenant" (*id.* at 5a (footnote omitted)). Paragraph 2 of the decree with the City made clear, however, that (*id.* at 124a)

> [n]othing herein shall be interpreted as requiring the City to * * * promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure.

2. After entering an order provisionally approving the decrees,[1] the district court, on August 3, 1981, held a fairness hearing to consider the objections of interested nonparties (Pet. App. 238a). The Birmingham Firefighters Association 117 (BFA), among others, appeared and filed objections as amici curiae (J.A. 699-713). After the hearing but before final approval of the decrees, the BFA and two of its members moved to intervene as of right in each of the three original actions, contending that the proposed decrees would adversely affect their rights (J.A. 772-776; Pet. App. 5a-6a). On August 21, 1981, the district court entered an order approving the consent decrees and denying the motions to intervene as untimely (Pet. App. 236a-249a). See *United States* v. *Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981), aff'd, 720 F.2d 1511 (11th Cir. 1983).

3. After the entry of the district court's order, seven white firefighters, all members of the BFA, filed a complaint in the district court against the City and the Board. See *Bennett* v. *Arrington*, No. CV-82-P-0850-S (N.D. Ala.) (Pet. App. 110a-121a). The complaint alleged that enforcement of the consent decrees would discriminate against them in violation of Title VII and sought a preliminary injunction. The district court denied the request for injunctive relief. J.A. 37; Pet. App. 6a, 110a.

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[1] That order, issued on June 8, 1981, also certified the settlement classes. Under that order, the parties published in local newspapers notice of the decrees, inviting interested persons to appear at the scheduled fairness hearing before the district court. J.A. 694-696; see *id.* at 697-698. The parties also mailed to each member of the minority and female subclasses an explanation of the decrees and notice of the scheduled fairness hearing. See Pet. App. 171a-175a, 180a-201a.

The court of appeals affirmed. *United States* v. *Jefferson County*, 720 F.2d 1511 (11th Cir. 1983) (J.A. 149-161).[2] The court held that the white firefighters were not entitled to injunctive relief because of their inadequate showing of irreparable harm (720 F.2d at 1519-1520; J.A. 160-161). The court also dismissed the firefighters' appeal from the denial of intervention, holding that the district court had not abused its discretion, in part because the firefighters could "institut[e] an independent Title VII suit, asserting the specific violations of their rights" (720 F.2d at 1518; J.A. 158).[3]

4. After unsuccessfully seeking preliminary injunctive relief, the firefighters pursued their complaint in the district court against the City and the Board. A second group of white firefighters, the *Wilks* respondents, filed a similar complaint against

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[2] The appeal from the district court's order denying injunctive relief was consolidated with the appeal from the court's order denying intervention (J.A. 152-153; Pet. App. 7a).

[3] The court of appeals also upheld the district court's exercise of its discretion under Fed. R. Civ. P. 24(a) on the grounds that "[t]he BFA members * * * knew at an early stage in the proceedings that their rights could be adversely affected" (720 F.2d at 1516; J.A. 154) and that the grant of intervention "would plainly have prejudiced the existing parties, since it would have nullified these negotiations [for a settlement] with the Board and allowed a pattern of past discriminatory practices to continue" (720 F.2d at 1517; J.A. 155).

In the court of appeals, the United States contended that the motions to intervene were untimely, prejudicial to the parties, and improper under Fed. R. Civ. P. 24(a). See Brief for the United States at 14-26, *United States* v. *Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).

the City and the Board. See *Wilks* v. *Arrington*, No. CV-83-AR-2116-S (N.D. Ala.) (J.A. 130-134); Pet. App. 7a. The complaint alleged that the City and the Board had denied promotions to the white firefighters in favor of certain less qualified black firefighters, in violation of Title VII and the Equal Protection Clause; the complaint further sought to enjoin the City from making those promotions (J.A. 130-134; Pet. App. 7a). Several other city employees who had been denied promotions also filed similar complaints against the City and the Board.[4] In addition, the United States brought suit against the City and the Board, alleging that the City's practice of promoting blacks over demonstrably better qualified whites violated, inter alia, Title VII and the Equal Protection Clause (J.A. 258-262; Pet. App. 8a).[5] In

[4] See *Birmingham Ass'n of City Employees* v. *Arrington*, No. CV-82-P-1852-S (N.D. Ala.) (J.A. 91-100); *Zannis* v. *Arrington*, No. CV-83-AR-2680-S (N.D. Ala.); *Garner* v. *City of Birmingham*, No. CV-82-M-1461-S (N.D. Ala.); *Howard* v. *City of Birmingham Pub. Inspection Services*, No. CV-83-P-3010-S (N.D. Ala.).

[5] The United States, as a signatory to the consent decrees, was originally named as a defendant in two of the "reverse discrimination" actions, as the district court called them. The district court later granted the United States' motion to intervene as party plaintiff in the remaining cases. The court also granted the United States' motion to realign itself as plaintiff in the two suits in which it had been named as a defendant. J.A. 292, 329; Pet. App. 8a & n.10.

The *Martin* petitioners, as the plaintiffs in the original 1974 action and signatories to the consent decrees, moved both in their individual capacities and as class representatives to intervene as parties defendant in several suits. The district court permitted the *Martin* petitioners to intervene only in their individual capacities. See J.A. 46-47, 106-108, 169-171, 185-187; Pet. App. 9a & n.12.

April 1984, the district court consolidated the actions under the caption "In re Birmingham Reverse Discrimination Employment Litigation" (J.A. 218-219; Pet. App. 9a).

After a trial in December 1985 concerning only the promotion of blacks in the City's Fire and Engineering Departments, the district court granted the Board's motion to dismiss (Pet. App. 11a, 27a-66a). The court concluded that "[the] plaintiffs cannot collaterally attack the [consent] Decree's validity" (*id.* at 61a), and focused its attention on the City's compliance with paragraph 2 of the consent decree (see page 3, *supra*). See J.A. 237-238, 250-251, 280-288. The court further held that the *Wilks* respondents and the United States were bound by the consent decrees and concluded that there had been no showing that the City's promotion practices violated paragraph 2 (Pet. App. 10a-11a, 60a-64a).

5. On appeals by the *Wilks* respondents, who by then included one white employee of the City's Engineering Department as well as the firefighters, and the United States, a divided panel of the court of appeals reversed and remanded for trial the *Wilks* respondents' claims under Title VII and the Equal Protection Clause.[6] The court held that "[b]ecause * * *

[6] The court of appeals instructed the district court (Pet. App. 19a), on remand, "to evaluate the defendants' justification for the challenged promotions under the standards articulated in" *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987). The court further instructed the district court to review the consent decrees with the "heightened scrutiny" (Pet. App. 20a) required by *Johnson*. See *Johnson* v. *Transportation Agency*, slip op. 19-20 (inquiry whether affirmative

[the *Wilks* respondents] were neither parties nor privies to the consent decrees, * * * their independent claims of unlawful discrimination are not precluded" (Pet. App. 12a-13a). The court explicitly rejected the "doctrine of 'impermissible collateral attack'" (*id.* at 13a) espoused by other courts of appeals to "immuniz[e] parties to a consent decree from charges of discrimination by nonparties, provided the alleged discriminatory acts were taken pursuant to the consent decree" (*ibid.*). See, *e.g.*, *Dennison* v. *City of Los Angeles Dep't of Water & Power*, 658 F.2d 694 (9th Cir. 1981). The court stated that "[t]he policy of encouraging voluntary affirmative action plans," a rationale for the doctrine against collateral attacks, "must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed" (Pet. App. 14a). The court recognized that the *Wilks* respondents' "Title VII claims did not accrue until after the decrees became effective and the challenged promotions were made" and that the *Wilks* respondents did not have "an identity of interest with a party to the consent decrees such that they should

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action plan "unnecessarily trammeled" rights of nonminority employees).

The court of appeals also affirmed the district court's dismissal of the United States' claims, holding that "the United States is estopped from collaterally attacking the consent decrees because it is a party to them" (Pet. App. 20a), without discussing the propriety of the United States asserting the right of others to challenge the decrees. Despite contrary allegations (see, *e.g.*, 87-1614 Br. 10), the United States recognizes that the consent decrees require it to defend their validity, and has not sought review of that holding.

be treated as parties for preclusion purposes" (*id.* at 15a).[7]

SUMMARY OF ARGUMENT

The court of appeals correctly held that the collateral attack doctrine may not preclude individuals, such as the *Wilks* respondents, from challenging employment-related actions taken under Title VII consent decrees to which they were not a party. As a threshold matter, that issue was presented to the court of appeals—and is properly presented to this Court—because it is at least unclear that the district court in fact ruled on the merits of respondents' challenge to the consent decrees. The district court was explicit in holding that respondents were barred under the collateral attack doctrine from challenging the terms of the consent decrees, and its limited references to the propriety of various aspects of the decrees do not clearly indicate that it proceeded—unnecessarily given its other ruling—to decide the merits of respondents' challenge.

It is a fundamental principle of due process that a judgment may not be held binding on a litigant who was neither party nor privy to the litigation in which that judgment was entered. While certain carefully drawn exceptions to this rule against nonparty pre-

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[7] Judge Anderson dissented, stating that "the appropriate resolution of this case would distinguish between the individual plaintiffs' claim for back pay and their claim for prospective relief" (Pet. App. 22a). Judge Anderson contended that the City should not be liable for back pay (*id.* at 22a-24a). He agreed substantially with the majority, however, that the "plaintiffs are not bound by the consent decree and should be free on remand to challenge the consent decree *prospectively* and test its validity" (*id.* at 24a (emphasis added)).

clusion exist, none is applicable here. In particular, no certified class in the original lawsuit adequately represented the interests of the *Wilks* respondents, nor did those respondents exercise control over the conduct of any party in that litigation. Thus, the consent decree that was entered represented neither an agreement nor an adjudication to which respondents could fairly be bound.

The collateral attack doctrine is also inconsistent with the approach to intervention and joinder established by the Federal Rules of Civil Procedure. The drafters of those rules determined that the concern for finality of judgments would be better served by mandatory joinder than by mandatory intervention procedures. Accordingly, in Rule 19, they placed the burden on the courts and the existing parties, not on the nonparties, to ensure that the risk of double, multiple, or otherwise inconsistent judgments is minimized.

A contrary reading of Rule 19 cannot be justified on the basis of particular difficulties alleged to ensue from application of the rule's clear meaning. Neither the specter of multi-party litigation nor asserted problems in pursuing defendant class actions are persuasive arguments for placing on nonparties the burden to join or be bound anyway, contrary to the clear intention of the drafters of the Federal Rules. Nor, especially in view of existing provisions for transfer and consolidation of lawsuits, and the principles of stare decisis and comity, can the danger of inconsistent or contradictory proceedings justify the rule petitioners assert.

Finally, this Court has recognized that the policy favoring settlement of Title VII suits cannot be used to justify the abrogation of nonparties' legal rights. Allowing third persons to challenge consent decrees

will not stop parties from entering into mutually advantageous settlements and, in any event, true voluntary compliance with Title VII requires either that all interested persons consent to any settlement agreement or that the agreement negotiated be able to withstand their third-party challenge.

ARGUMENT

INDIVIDUALS ARE ENTITLED TO CHALLENGE EMPLOYMENT-RELATED ACTIONS TAKEN UNDER CONSENT DECREES TO WHICH THEY WERE NOT A PARTY

The court of appeals correctly held that the collateral attack doctrine may not preclude individuals, such as the *Wilks* respondents, from challenging employment-related actions taken under consent decrees entered in the *Jefferson County* litigation, and properly remanded the case for consideration of the merits of respondents' challenge.

A. *This Case Properly Presents The Question Whether Individuals Who Are Not A Party To A Consent Decree May Challenge It In Subsequent Litigation*

Petitioners claim (87-1614 Br. 34-41; 87-1639 Br. 17-18; 87-1668 Br. 35-40) that the court of appeals erred in remanding the case because the district court did, in fact, fully adjudicate the *Wilks* respondents' challenge under Title VII and the Equal Protection Clause. That contention distorts the record. The district court concluded that the *Wilks* respondents "cannot collaterally attack the Decree's validity," and stated that "[t]he only avenue of attack open to the private plaintiffs is to show that challenged action was not taken pursuant to the Decree" (Pet. App. 61a-62a, 106a). The district court also found the fact that an action was taken pursuant to a con-

sent decree to be "proof that it was not taken with the requisite discriminatory intent" (*id.* at 62a, 107a). Thus the district court plainly viewed respondents as barred from challenging the provisions of the consent decree or any actions taken under its direction. The fact that it also made passing references to its continuing belief in the correctness of the decree (*id.* at 39a-40a, 62a, 84a-85a, 106a) cannot, in this context, be viewed with assurance as a resolution of the merits of the claims. Thus, the court of appeals correctly proceeded on the premise that the district court's application of the collateral attack doctrine was dispositive.

B. *The Collateral Attack Doctrine Is Inconsistent With Notions Of Procedural Fairness, Which Require That A Person Be Bound Only Upon His Own Agreement Or After Receiving His Day In Court*

This Court has long stated that "[i]t is a violation of due process for a judgment to be [held] binding on a litigant who was not a party or a privy" to the litigation in which the judgment was entered (*Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 n.7 (1979)). See, *e.g.*, *Blonder-Tongue Laboratories, Inc.* v. *University Found.*, 402 U.S. 313, 328-329 (1971); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969); *Hansberry* v. *Lee*, 311 U.S. 32, 40-42 (1940). As Chief Justice Rehnquist has noted, "[t]his rule can be traced to an opinion of Chief Justice Marshall in *Davis* v. *Wood*, 1 Wheat. 6, 8-9 (1816)," and "is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Ashley* v. *City of Jackson*, 464 U.S. 900, 902 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from the denial of certiorari) (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4449, at 417 (1st ed. 1981)). This "deep-rooted historic tradition," which is embodied in both the Due Process Clause and the various rules that Congress has enacted to govern the administration of the federal courts, recognizes that just and accurate decisionmaking is more likely to result when courts allow persons to present their own cases, at the time and place of their own choosing. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. at 327 n.7; *Blonder-Tongue Laboratories, Inc.* v. *University Found.*, 402 U.S. at 328-329; see generally 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3841, at 200-202 (1st ed. 1976); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4449, at 415-419 (1st ed. 1981); *id.* § 4452, at 446-453.

To be sure, producing just and accurate judicial decisionmaking is not the only legitimate concern of our legal system. Finality, efficiency, and consistency of decision are also substantial concerns. Accordingly, procedural devices exist for bringing nonparties into litigation and, in appropriate circumstances, a person may be joined in and thus become bound by litigation in which he would prefer not to participate. See Fed. R. Civ. P. 19.

Indeed, a person may be bound by litigation to which he is not a party where there are sufficient assurances that his interests are adequately represented in that litigation by a certified class (see *Hansberry* v. *Lee*, 311 U.S. at 41-42; Fed. R. Civ. P. 23), where he has sufficient control over the conduct of one of the parties to that litigation (see *Montana* v. *United States*, 440 U.S. 147, 154-155 (1979); 18 C. Wright, A. Miller & E. Cooper, *supra*, § 4451, at 427), or where there is a special remedial scheme—as, for example, exists in bankruptcy, reorganization, environ-

mental [8] and probate statutes—that expressly forecloses successive litigation by nonparticipants (see 18 C. Wright, A. Miller & E. Cooper, *supra*, § 4452, at 451, § 4458, at 520-521; see also *Chicago, R.I. & P. Ry.* v. *Schendel*, 270 U.S. 611, 618-620 (1926)).

Despite petitioners' assertions, none of the exceptions to the general rule against preclusion of nonparties applies in this case.[9] Here, the *Wilks* respond-

[8] See, *e.g.*, the Clean Air Act, 42 U.S.C. 7604(b)(1)(B); the Clean Water Act, 33 U.S.C. 1365(b)(1)(B); and the Resource Conservation and Recovery Act, 42 U.S.C. (Supp. IV) 6972(b)(1)(B).

[9] Nor do petitioners' references to *Penn-Central Merger & N & W Inclusion Cases*, 389 U.S. 486 (1968), and *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968), offer support for barring litigation by individuals who were not consulted and never agreed to the terms of a consent decree. The *Penn-Central* case involved the review of ICC merger and inclusion orders that were part of a vast reorganization of rail transportation implementing the congressional policy favoring consolidation of the nation's railroads into a limited number of systems. In that case, parties filed actions in a number of district courts seeking to challenge the orders of the Interstate Commerce Commission approving the merger of 36 rail carriers into the Penn-Central system and directing that three smaller railroads be included in the Norfolk & Western system. Courts other than the three-judge District Court for the Southern District of New York stayed those actions in order to permit orderly disposition of the issues in the New York litigation. 389 U.S. at 496-497. The Borough of Moosic, Pennsylvania, a plaintiff in an action before the Middle District of Pennsylvania, petitioned this Court for a writ of mandamus or certiorari seeking to overturn the stay order (*id.* at 503). That petition was consolidated with a number of appeals from the three-judge panel's order approving the merger and the inclusion of the three protected rail lines into the Norfolk & Western system.

This Court affirmed the district court's order approving the merger and inclusion (389 U.S. at 498-502). Turning to the

ents filed a lawsuit separate and apart from the *Jefferson County* litigation. The parties in the initial

Borough's petition for mandamus or certiorari, the Court held that the Pennsylvania district court's order dissolving its stay had rendered that petition moot (*id.* at 503). The Court also concluded that the Borough and two other parties, both of whom had originally joined in the New York litigation but had abandoned those efforts by intervening in the stayed Pennsylvania action, could not then seek to enjoin the merger and inclusion orders in the latter forum because the "decision of the New York court which, with certain exceptions, we have affirmed, precludes further judicial review or adjudication of the issues upon which it passes" (*id.* at 505-506). The Court stated, however, that its holding applied only to the Pennsylvania district court's stay order and that "any claims for specific relief, such as particularized objections which may arise from specific proposals for consolidation or reduction of facilities or services, are unaffected by [the Court's] decision * * *" (*id.* at 506). Thus, those parties who elected not to participate in the primary litigation in the Southern District retained the right to challenge in court specific steps taken pursuant to the consolidation believed to have detrimental effects upon them.

In *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 114 (1968), the Court was confronted with the question whether a judgment against an insurance company should be allowed to stand where the parties failed to join the insured party whose policy was limited by a liability cap and whose rights to future coverage under the policy would thus be affected by the outcome of the present case. In upholding the judgment, the Court specifically declined to decide whether an arguably indispensable party who "purposely bypassed an adequate opportunity to intervene" should be bound by the court's decision made in his absence. However, the Court did state that since the arguably indispensable party was "never before the [district] court, he cannot be bound by the judgment rendered," *i.e.*, the judgment would not be "*res judicata* as to, or legally enforceable against, a nonparty." 390 U.S. at 110 (footnote omitted); see also *id.* at 122 ("there can be no binding adjudication of a person's rights in

litigation did not attempt to join the *Wilks* respondents as parties to their litigation—and did not seek their approval of the consent decree—despite their knowing full well that the proposed settlement would adversely affect such nonparties' interests. And there has been no showing that any certified class in the primary lawsuit adequately represented the *Wilks* respondents' interests,[10] or that the *Wilks* respondents had control over the conduct of any party in the *Jefferson County* litigation. On the contrary, the court of appeals explicitly found that (Pet. App. 16a)

> [g]iven the disparate interests of the City and the [*Wilks* respondents], it is clear that the City could not have served as an effective surrogate for the [respondents'] interests when it negotiated the plan incorporated into the consent decrees.

Thus, under time-honored rules of due process and civil procedure, the court of appeals correctly held

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the absence of that person" (citing *Mallow* v. *Hinde*, 25 U.S. (12 Wheat.) 193 (1827)). Accordingly, the Court observed that the absent party "may still claim that as a nonparty he is not estopped by that judgment from relitigating the issue" (390 U.S. at 114). In other words, contrary to petitioners' suggestions, *Patterson* does not at all signal the Court's retreat from the principle that judgments are binding only upon those party or privy to the litigation.

[10] As petitioners point out, the record shows that the BFA, the union to which the *Wilks* respondents belong, appeared at the fairness hearing and presented objections to the proposed consent decree. Assuming that the BFA in fact represented the *Wilks* respondents' interests and voiced their objections, there is no suggestion that its participation amounted to an agreement to the terms of the consent decree, such as would foreclose further litigation of the issues presented. *Firefighters* v. *Cleveland*, 478 U.S. 501, 528-530 (1986); see also *Firefighters* v. *Stotts*, 467 U.S. 561, 588 n.3 (1984) (O'Connor, J., concurring).

that the *Wilks* respondents may proceed with their suit.[11] See *Firefighters* v. *Cleveland*, 478 U.S. 501, 528-530 (1986); *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 770-772 (1983); see also *United States* v. *Mendoza-Lopez*, No. 85-2067 (May 26, 1987), slip op. 9-13.

C. *The Collateral Attack Doctrine Is Inconsistent With The Rules Of Intervention And Joinder Established By the Federal Rules of Civil Procedure*

Petitioners contend that the court below erred in refusing to follow the line of cases holding that collateral attacks on consent decrees in Title VII actions are not permissible, especially where the *Wilks* respondents were aware of the underlying lawsuit and the proposed consent decrees, and had an opportunity to intervene in the proceedings.[12] Petitioners argue

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[11] Title VII does authorize the Attorney General and the Equal Employment Opportunity Commission to initiate lawsuits on behalf of aggrieved individuals and, in such cases, gives the aggrieved individuals an absolute right to intervention. See 42 U.S.C. 2000e-5(f)(1). Some courts have therefore held that the statutory scheme precludes those aggrieved individuals from initiating successive litigation once the government's litigation has concluded. See, *e.g.*, *Adams* v. *Proctor & Gamble Mfg.*, 697 F.2d 582 (4th Cir. 1983) (en banc), cert. denied, 465 U.S. 1041 (1984); *Jones* v. *Bell Helicopter Co.*, 614 F.2d 1389 (5th Cir. 1980). Whether those decisions are correct or not, they make clear that Title VII contains no provision authorizing a private litigant to initiate an action on behalf of another individual and thereby preclude that individual from bringing an action on his own behalf at the time and place of his own choosing (absent formal class certification procedures).

[12] See, *e.g.*, *Devereaux* v. *Geary*, 765 F.2d 268 (1st Cir. 1985), cert. denied, 478 U.S. 1021 (1986); *Thaggard* v. *City of Jackson*, 687 F.2d 66 (5th Cir. 1982), cert. denied, 464 U.S. 900 (1983); *Stotts* v. *Memphis Fire Dep't*, 679 F.2d 541 (6th

that allowing challenges to consent decrees entered in Title VII litigation will prevent the attainment of final judgments and raise the specter of inconsistent or contradictory proceedings. They urge that the appropriate resolution of competing concerns is to require that persons with interests affected by ongoing Title VII litigation, such as the *Wilks* respondents, intervene in those lawsuits or face preclusion by the judgments entered therein.

Such a resolution, however, is incompatible with the Federal Rules of Civil Procedure. The drafters of those Rules expressly faced the concerns about finality and the desire of nonparties to relitigate issues previously decided. They recognized that rules of intervention have always been drawn in permissive terms and, therefore, that nonparties can refrain from intervention in litigation that affects them.[13] Rather

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Cir. 1982), rev'd on other grounds *sub nom. Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984); *Dennison* v. *City of Los Angeles Dep't of Water & Power*, 658 F.2d 694 (9th Cir. 1981); *Goins* v. *Bethlehem Steel Corp.*, 657 F.2d 62 (4th Cir. 1981), cert. denied, 455 U.S. 940 (1982); *Society Hill Civic Ass'n* v. *Harris*, 632 F.2d 1045 (3d Cir. 1980).

[13] See Fed. R. Civ. P. 24(a) (intervention as of right) ("[u]pon timely application anyone shall be permitted to intervene"); Fed. R. Civ. P. 24(b) (permissive intervention) ("[u]pon timely application anyone may be permitted to intervene"). See also *Chase Nat'l Bank* v. *City of Norwalk*, 291 U.S. 431, 441 (1934) ("The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. * * * Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights."); accord, *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 593 (1974); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969); *Gratiot County State Bank* v. *Johnson*, 249 U.S. 246, 249-250 (1919).

than redraft the rules of intervention in mandatory terms, however, they determined that the concern for finality of judgments would be "better [served] by mandatory joinder procedures" (18 C. Wright, A. Miller & E. Cooper, *supra*, § 4453, at 453). Accordingly, they added Rule 19 to the Federal Rules of Civil Procedure. See Advisory Committee's Note to Fed. R. Civ. P. 19.

Rule 19 has two parts. Part (a) requires the existing parties and the court to join those persons whose presence is necessary and desirable for a just adjudication.[14] Part (b) requires the existing parties and the court to work out a fair and just solution when joinder is not possible—so that neither the absent person nor those already party to the litigation will be prejudiced by, for example, the issuance of a decree that impairs their rights or exposes them to double, multiple, or otherwise inconsistent obliga-

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[14] Rule 19(a) (emphases added) provides that

> [a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction * * * *shall* be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) *the person claims an interest relating to the subject of the action* and is so situated that the disposition of the action in the person's absence may (i) *as a practical matter impair or impede the person's ability to protect that interest* or (ii) *leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.* If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

tions.[15] Together, parts (a) and (b) of Rule 19 place the responsibility (and means) for obtaining a final judgment with the courts and the existing parties, and *not* with the nonparties (such as the *Wilks* respondents) to the litigation. Accord, *Consumers Union of the United States, Inc.* v. *Consumer Products Safety Comm'n*, 590 F.2d 1209, 1223 (D.C. Cir. 1978), rev'd on other grounds *sub nom. GTE Sylvania, Inc.* v. *Consumers of the United States, Inc.*, 445 U.S. 375 (1980). The judicially developed collateral attack doctrine cavalierly ignores this allocation of responsibility and is thus irreconcilable with the procedural scheme envisioned by the drafters of Rule 19 and the Congress that approved that rule's adoption.[16]

[15] Rule 19(b) provides that

> [i]f a person * * * cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or to those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

[16] As Professor Laycock has observed, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. Chi. Legal F. 103, 142 (footnotes omitted):

> *A* best knows what relief he is seeking, and if that relief will directly interfere with *C*'s arguable claim of right, *A* is seeking relief against *C* just as much as he is seeking relief against *B*. *A* will typically know about *C* at least as soon as *C* knows about *A*'s lawsuit and the requested relief—usually long before. It is *A*'s responsibility to join *C*. If *A* does not join him, Rule 19 requires the court to order that he be joined. *C* has no similar duty to intervene. Rule 19 imposes a duty; Rule 24 creates only an opportunity. The plaintiff and the court should not be allowed to ignore their responsibilities under Rule 19, and then oppose intervention or subsequent litigation on grounds of timeliness.

Petitioners offer no sound basis for ignoring the clear meaning of Rule 19. They raise (87-1668 Br. 32-34) the specter of unmanageable lawsuits if joinder under Rule 19 is required. However, even under petitioners' proposed "intervene or be bound" rule, that possibility exists, see *United Airlines* v. *McDonald*, 432 U.S. 385, 394 n.15 (1977); in any event, multi-party lawsuits are one of the inherent costs of insulating judgments or consent decrees from third-party challenges. A Title VII defendant who wishes to insulate himself against future liability to third parties by virtue of the terms of a present settlement can only do so by joining those parties in the settlement.

Petitioners also overstate the difficulties of defendant class actions under Rule 23 (87-1668 Br. 33). Numerous defendant class actions have ben prosecuted, and we see no reason to doubt that district courts can be entrusted with "the responsibility and discretion to create and certify defendant class actions that will not become constitutional or administrative monsters." *Henson* v. *East Lincoln Township*, 814 F.2d 410, 420 (7th Cir. 1987) (Campbell, J., concurring in part and dissenting in part), cert. granted, No. 87-5461 (Nov. 2, 1987); see generally Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630, 639-647 (1978). In the typical case, such as here, nonminority employees whose rights would likely be affected by the resolution of the minority employees'

claims could be joined as a class under Rule 23(b)(1)(A), which applies "when practical necessity forces the opposing party [*i.e.*, the employer] to act in the same manner toward the individual class members and thereby makes inconsistent adjudications in separate actions unworkable or intolerable." 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1773, at 434 (2d ed. 1986).[17] Moreover, such class members could not easily avoid the binding effect of the judgment because the "opt out" provision would be unavailable. See *Reynolds* v. *National Football League*, 584 F.2d 280, 284 (8th Cir. 1978) (where class actions maintainable under Rule 23(b)(1) or Rule 23(b)(3), former controls for purposes of determining binding effect of judgment in order to further that provision's purpose of eliminating risk of inconsistent adjudications); *Robertson* v. *National Basketball Ass'n*, 556 F.2d 682, 685 (2d Cir. 1977) (same); see also 7A C. Wright, A. Miller & M. Kane, *supra*, § 1772, at 425-426.[18]

Nor can the collateral attack doctrine be justified (see, *e.g.*, 87-1614 Br. 22-30; 87-1639 Br. 14-17; 87-1668 Br. 18-20) as necessary to avoid the danger of inconsistent or contradictory proceedings. That objective is one of the principal purposes of Rule 19, whose provisions are essentially circumvented by a ban on collateral challenges. See Fed. R. Civ. P. 19(a) (joinder required where person's absence

[17] The class action the court condemned in *Henson* v. *East Lincoln Township*, 814 F.2d 410 (7th Cir. 1987), cert. granted, No. 87-5461 (Nov. 2, 1987), was proposed under Rule 23(b)(2), which, as stated above, would not likely be used in the context of cases such as this.

[18] Under Rule 23(c), the "opt out" alternative is not available to Rule 23(b)(1) class members.

would "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations"); see also McCoid, *A Single Package for Multiparty Disputes*, 28 Stan. L. Rev. 707, 723-724 (1976).[19] Moreover, transfer and consolidation procedures are available to prevent judicial proceedings from multiplying uncontrollably or undesirably and to enable a single judge to control litigation that is initiated by different parties in different places. See 28 U.S.C. 1404(a); Fed. R. Civ. P. 42; *Bolden* v. *Pennsylvania State Police*, 578 F.2d 912 (3d Cir. 1978); 15 C.

[19] Contrary to the *Arrington* petitioners' claim (87-1668 Br. 31), *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), does not suggest that Rule 19 is inapplicable to "public rights" litigation. There, the Court stated that the Board's proceeding, which was "narrowly restricted to the protection and enforcement of [the] public rights [reflected in the National Labor Relations Act]," was not a proper forum for adjudicating the private rights of individual employees (*id.* at 363). The Court held, therefore, that the Board had the power, "acting in its public capacity to give effect to the declared public policy of the Act" (*id.* at 362), to order the employer, without first joining the employees, to cease practices that violate that policy.

In so holding, the Court noted, as we have argued here, that the Board lacked the power to issue a binding ruling on the contract rights of the individual employees who were not party to the Board's proceeding. See 309 U.S. at 362 ("It is elementary that it is not within the power of any tribunal to make a binding adjudication of the rights *in personam* of parties not brought before it by due process of law."). The Court thus made clear that the Board's order did "not foreclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication" (*id.* at 365).

Wright, A. Miller & E. Cooper, *supra*, § 3841, at 200-202; *id.* § 3485, at 287.[20]

Indeed, even where joinder, transfer, and consolidation devices will not together ensure that only a single binding judgment can result concerning any particular matter, principles of stare decisis and comity will inform the second court that acquires jurisdiction over that matter and thus minimize the possibility of inconsistent or contradictory judgments. See *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976); *Kerotest Mfg.* v. *C-O-Two Fire Equip. Co.*, 342 U.S. 180, 181-182 (1952). And, in all events, the concern for correctness of judicial decisionmaking is as important as the concern for consistency among judgments and, accordingly, some inconsistent or contradictory judgments must be accepted.[21]

In trying to eliminate (rather than to minimize) the possibility of such inconsistent judgments, the

[20] See also Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. (1988) (forthcoming) (criticizing collateral attack doctrine as illegitimate effort to eliminate nonparties' substantive rights and advocating use of transfer and consolidation procedures under 28 U.S.C. 1404(a) and 1631 as readily available alternatives).

[21] Where such inconsistent or contradictory judgments arise, well-established procedures are available to ensure that the person subject to those judgments does not place himself in contempt of either court's judgment. The person may, of course, seek reversal of the second judgment on appeal. And, if unsuccessful on appeal, the person will have an appropriate ground upon which to seek relief from the court entering the first judgment. See Fed. R. Civ. P. 60. Thus, the *Martin* petitioners' concern (87-1614 Br. 26-27) is overstated and is also dispelled by the history of this litigation. See *United States* v. *Jefferson County*, 720 F.2d 1511, 1517-1519 (11th Cir. 1983).

collateral attack doctrine ignores our "clear experience with the general fallability of litigation and with the specific distortions of judgment that arise from the very identity of the parties" (18 C. Wright, A. Miller & E. Cooper, *supra*, § 4449, at 417). Ironically, that experience has been most evident in cases involving Title VII consent decrees, which themselves amount to "little more than a contract between the parties, formalized by the signature of a judge" (*Ashley* v. *City of Jackson*, 464 U.S. at 902 (Rehnquist, J., dissenting from denial of certiorari); see also *Firefighters* v. *Cleveland*, 478 U.S. at 517-524), and which involve strong incentives and opportunity to make innocent and unrepresented third-persons pay the price of sins that were not their own and from which they may not personally have benefitted.[22] Accord, *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 767-770, 771-772 (1983); *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 239-240 (1983).[23]

[22] Examples of this phenomenon are not limited to Title VII litigation. See, *e.g.*, *Wilder* v. *Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986) (settlement of suit in which New York City agreed not to support with public funds private charitable organizations that gave preference to Catholic and Jewish children; consent decrees entered over objections of the charities at a fairness hearing), aff'd, 848 F.2d 1338 (2d Cir. 1988); *Harrisburg Chapter of the American Civil Liberties Union* v. *Scanlon*, 500 Pa. 549, 458 A.2d 1352 (1983) (named parties settled lawsuit by agreeing that student groups could not conduct extracurricular prayer meetings on high school property; no affected student group participated in the litigation). See also Epstein, Wilder v. Bernstein: *Squeeze Play By Consent Decree*, 1987 U. Chi. Legal F. 209.

[23] See also *Firefighters* v. *Stotts*, 467 U.S. 561, 589 n.4 (1984) (O'Connor, J., concurring); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 787-799 (Powell, J., concurring in part and dissenting in part); *Johnson* v. *Transpor-*

In arguing for a rule of "intervene or be bound," petitioners and amici paint a rosy picture regarding the availability of intervention as an avenue for relief for nonparties. See, *e.g.*, Brief of the Equal Employment Advisory Council as Amicus Curiae 12 ("Intervention is liberally available in Title VII proceedings."). In fact, strict rules concerning timeliness of intervention have been applied by several courts of appeals, with the result that application of the collateral attack doctrine may leave many interested third-persons without any opportunity to be heard at all. For this very reason, the collateral attack doctrine has been criticized by members of this Court, various courts of appeals, and numerous commentators.[24]

Several courts of appeals have held that the timeliness of intervention must be measured from the date upon which a complaint or proposed consent decree is filed, rather than from the date on which the would-be intervenors' cause-of-action allegedly accrued, whether their interests have been adversely affected at that earlier time or not. See, *e.g.*, *United*

tation Agency, No. 85-1129 (Mar. 25, 1987), slip op. 19-21 (Scalia, J., dissenting); *Firefighters* v. *Cleveland*, 478 U.S. at 534-535 (White, J., dissenting).

[24] See *Ashley* v. *City of Jackson*, 464 U.S. at 901-902, 904 (Rehnquist, J., joined by Brennan, J., dissenting from the denial of certiorari); *Dunn* v. *Carey*, 808 F.2d 555, 559-560 (7th Cir. 1986); *Corey* v. *Jackson Police Dep't*, 755 F.2d 1207, 1210 (5th Cir. 1985); Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process*, 1987 U. Chi. Legal F. 155; Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. (1988) (forthcoming); Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. Chi. Legal F. 103.

States v. *Yonkers Bd. of Educ.*, 801 F.2d 593, 594-596 (2d Cir. 1986); *Devereaux* v. *Geary*, 765 F.2d 268, 271-275 (1st Cir. 1985), cert. denied, 478 U.S. 1021 (1986); *Corley* v. *Jackson Police Dep't*, 755 F.2d 1207, 1209-1210 (5th Cir. 1985). Thus, it may well be impossible in some circuits for third parties to intervene and challenge a proposed consent decree. On the one hand, before the consent decree is made public, they may not be aware that it has been proposed or they may not have yet suffered the concrete injury on which they can properly base a motion for intervention. See, *e.g.*, *Firebird Society, Inc.* v. *Board of Fire Comm'rs*, 66 F.R.D. 457 (D. Conn.), aff'd mem., 515 F.2d 504 (2d Cir.), cert. denied, 423 U.S. 867 (1975). And, on the other hand, if they delay their attempt at intervention (until their interest becomes concrete), they will quite likely be turned away as having moved untimely to intervene.[25]

D. *The Collateral Attack Doctrine Cannot Be Justified By Reference To The Policy Favoring Voluntary Settlements Under Title VII*

The denial of due proces implicit in the collateral attack doctrine cannot be justified by reference to the policy of voluntary settlement of Title VII disputes. To be sure, "Congress [has] expressed a strong preference for encouraging voluntary settle-

[25] Moreover, even where intervention is held timely, the interested third-persons are typically allowed only to voice their objections to the "reasonableness" of the decree. See, *e.g.*, *Kirkland* v. *New York State Dep't of Correctional Services*, 711 F.2d 1117, 1129 (2d Cir. 1983), cert. denied, 465 U.S. 1005 (1984). This limited right of allocution before judgment is not the full and fair opportunity to be heard that due process requires that a person ultimately receive—as this Court has said. *Firefighters* v. *Cleveland*, 478 U.S. at 529-530.

ment of employment discrimination claims" (*Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)), and this Court accordingly has required that the resolution of interpretive questions concerning Title VII take account of the policy favoring voluntary settlement (see, *e.g.*, *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987), slip op. 12 & n.8; *Ford Motor Co.* v. *EEOC*, 458 U.S. at 229; *Carson* v. *American Brands, Inc.*, 450 U.S. at 88 n.14). But the Court has also explicitly recognized that the policy favoring settlement of Title VII disputes cannot be used to justify the abrogation of nonparties' protected legal interests.

In *Firefighters* v. *Cleveland*, *supra*, the Court held that, while the policy favoring voluntary settlement of Title VII suits allows a court to approve race-conscious consent decrees, that policy does not preclude a union representing nonminority employees from challenging such a decree on its merits. On the one hand, the Court noted, "[i]t has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearing on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent" (478 U.S. at 528-529). On the other hand, the Court added, "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors" (*id.* at 529). Rather, the Court concluded, "if properly raised, these claims remain and may be litigated by the [third-party]" (*ibid.*). Accord, *id.* at 530-531 (O'Connor, J., concurring); *W.R. Grace Co.* v. *Rubber Workers*, 461 U.S. 757, 770-771 (1983); see also *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 281 n.8 (1986) (plurality opinion).[26]

It is a gross overstatement to suggest, as do petitioners (see 87-1614 Br. 21-22; 87-1639 Br. 13-14; 87-1668 Br. 14-18), that settlement would lose its

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[26] In *W.R. Grace Co.* v. *Rubber Workers*, 461 U.S. 757 (1983), where an employer entered into a conciliation agreement with the EEOC that required it to disregard the seniority provisions of its extant collective bargaining agreement, the Court held that the policy favoring voluntary settlement of Title VII suits did not provide sufficient justification for overturning an arbitration award that required the employer to pay damages to employees who would not have been laid-off had the collective bargaining agreement's seniority provisions been followed. The Court noted that, "[a]lthough the ability to abrogate unilaterally the provisions of a collective-bargaining agreement might encourage an employer to conciliate with the [EEOC], the employer's added incentive to conciliate would be paid for with the union's contractual rights" (as well as the rights of individual employees) (461 U.S. at 771; *id.* at 770). The Court further noted that "conferring such power on the [EEOC] and an employer * * * would be unlikely to further *true conciliation between all interested parties*" (*ibid.* (emphasis added)), reasoning that, "[a]lthough an innocent union might decide to join in Title VII conciliation efforts in order to protect its contractual position, neither the employer nor the [EEOC] would have any incentive to make concessions to the union * * * [since they] would know that they could agree without the union's consent and that their agreement would be enforced" (*ibid.*). And, conversely, the Court added, "enforcing the award * * * should encourage conciliation and *true voluntary compliance with federal employment discrimination law*" because it would require that all employees' rights be respected in Title VII settlement negotiations (*ibid.* (emphasis added)).

utility if further litigation were permitted. To the extent the parties are compromising their own claims and thus sharing the cost of settlement among themselves, very little reduction in settlement incentives should occur. See *W.R. Grace Co.*, 461 U.S. at 771-772. The parties' incentive to settle would be eroded only to the extent that the settlement might give rise to liability on their part to the *Wilks* respondents (for the costs of the settlement, if any, that the *Wilks* respondents have been improperly asked to bear). Even then, it would appear that the diminution of incentive to settle between the existing parties would be no greater than is appropriate in light of the economic benefits that the settlement will have for them. The policy in favor of voluntary compliance and settlement under Title VII is promoted only where *all* persons with an interest in a Title VII dispute are party to a resulting consent decree or, in the absence of such consensus, where any consent decree that results can withstand substantive challenge from third-parties whose own Title VII rights are claimed to have been abridged. Compliance with Title VII is not encouraged when parties are allowed to ignore and, indeed, abrogate the rights of those who are not present.[27]

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[27] See also *Firefighters* v. *Stotts*, 467 U.S. at 588 n.3 (O'Connor, J., concurring) ("if innocent employees are to be required to make any sacrifices in the final consent decree, they must be represented and have had full participation rights in the negotiation process"; *id.* at 589 n.4 ("[t]he policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees or applicants").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 87-1614; 87-1639; 87-1668

In The

Supreme Court Of The United States

October Term, 1988

JOHN W. MARTIN, et al.,
Petitioners,

v.

ROBERT K. WILKS, et al.,
Respondents

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, et al.,
Petitioners,

v.

ROBERT K. WILKS, et al.,
Respondents.

RICHARD ARRINGTON, JR., et al.,
Petitioners,

v.

ROBERT K. WILKS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS RICHARD ARRINGTON, JR. AND THE CITY OF BIRMINGHAM

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QUESTION PRESENTED

Whether the nonminority plaintiffs are barred from relitigating the lawfulness of race- and gender-conscious relief previously awarded to blacks and females in a judicially-approved consent decree, given that the nonminorities knew of the original litigation and the relief sought from the outset; that over the course of seven years, encompassing two fully litigated trials and an appeal, they knowingly failed to intervene in the original litigation; and that their present objections were made, considered, and rejected in the original proceedings before the relief was entered.

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ARGUMENT

The critical issue before the Court is how best to achieve finality of complex public rights litigation consistent with due process. Respondents and their amici do not dispute that finality and the policies it advances — judicial economy, efficacy of judgments, and confidence in the American system of jurisprudence, among others — must be a realistic possibility in public rights litigation. Nor do they challenge the City's assertion that finality can be achieved by application of its proposed rule — namely, that one who knowingly foregoes a meaningful opportunity timely to intervene in litigation is estopped to relitigate issues decided in that litigation.

Rather, respondents contend that: 1) they should not be precluded for their failure to intervene because there is no "record evidence" that they had actual notice of the original litigation; 2) the "preclusion for failure timely to intervene" rule proposed by the City necessarily violates due process regardless of the narrow circumstances in which it would apply; and 3) joinder is available as an adequate mechanism by which to attain finality. None of these contentions withstand scrutiny.

I. RESPONDENTS HAD ACTUAL NOTICE OF THE ORIGINAL LIGITATION FROM ITS INCEPTION

In tacit recognition of the force of the City's proposed rule, the Wilks respondents resort to a disingenuous attempt to extricate themselves from application of that rule. They conjure an illusion that they did not have actual notice of the original litigation challenging the promotional system which had yielded a lilly-white supervisory staff in the Birmingham Fire Department. They further suggest that they were not on adequate notice of the terms of the Consent Decrees before the Fairness Hearing. Conspicuously absent, however, is an explicit denial that respondents had actual notice of the litigation and the terms of the Decrees in ample time to protect their interests. Instead, they claim only that there is

"no evidence in the record" that respondents had actual notice of these matters, and that "adequate formal notice" was not "given." Wilks Br. at 28, 23. These carefully-crafted intimations, made for the first time in this Court, are contradicted by respondents' own admissions in the course of this litigation and by the findings of the court below.

The white firefighters have repeatedly admitted that they had actual notice of the original litigation and knowledge of the terms of the proposed Decrees. In pursuing their belated motion to intervene, the white firefighters conceded that they had been aware of the litigation from the outset, but sought to justify their seven-year delay on their alleged reliance upon the defendant Personnel Board. Affidavit of Billy Gray, J.A. 722. On appeal from the trial court's denial of intervention, the white firefighters affirmatively admitted that they did have actual notice of both the litigation and the Consent Decrees:

> The firefighters first learned of the proposed settlement when public notice was given in June, 1981. . . . While the firefighters were aware of the litigation, the evidence shows they were not aware of any settlement discussions which could affect their complex promotional rights until public notice of the decrees was given in June, 1981. . . . The evidence shows that the firefighters simply knew the action was being defended by the City and Personnel Board. They did not know that the varying relief which could possibly be granted under Title VII could adversely affect them in greater degrees in the event the existing defendants decided to settle the case.

Feb. 23, 1982 Brief of Appellants in *United States v. Jefferson County,* Appeal #81-7761 (11th Cir.), at 6, 17-18. Their reply brief in that appeal makes the same admission:

> The affidavit of Billy Gray acknowledges that the Firefighters knew of the pendency of this action . . . The affidavit of Billy Gray further shows that the Firefighters were unaware of the negotiations which resulted in the consent decrees *until public notice was given in June, 1981.*

May 24, 1982, Reply Brief of Appellants in *United States v. Jefferson County,* Appeal #81-7761 (11th Cir.), at 4, 5 (emphasis supplied).

Thus, it is not surprising that the Eleventh Circuit, in affirming the denial of intervention, found that "[t]he BFA members knew at an early stage in the proceedings that their rights could be adversely affected." *United States v. Jefferson County,* J.A. 154. *See also,* Id. at 159 (court notes "BFA members' early knowledge that their rights could be affected"). Moreover, depositions taken in the course of this litigation disclose that the white firefighters actually distributed and discussed the proposed Decrees in June, 1981, well before the Fairness Hearing. *See* September 17, 1984 Deposition of Billy Gray, Vol. II, pp. 110-116 and Ex. 3.

In the face of their admissions, respondents are understandably reluctant to deny before this Court that they had actual notice of the litigation and the terms of the Decrees in time to raise their arguments in opposition. However, their effort to promote an erroneous impression reflects an unfortunate lack of candor. Respondents have not denied actual notice because they cannot. Their own admissions, together with the affidavit of Billy Gray and the Eleventh Circuit's express finding of actual notice, leave no doubt whatsoever that the white firefighters did enjoy actual notice from "an early stage" in the litigation.

II. ACTUAL NOTICE IS SUFFICIENT TO GIVE RISE TO THE OPPORTUNITY FOR FULL PARTICIPATION THROUGH INTERVENTION

Respondents contend that *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306 (1950), and *Tulsa Professional Collection Service v. Pope,* ___ U.S. ___, 108 S.Ct. 1340 (1988), require that formal paper notice be given each known, interested individual by mail or personal service if preclusion is to result from failure to intervene. Respondents read those cases too broadly. *Mullane* and *Pope* hold only that to be constitutional, a *statute* contemplating final resolution of all claims known and unknown, whether or not asserted, must

provide for the "best notice practicable." Where the statute does not, it is constitutionally infirm on its face, and must be struck down entirely. For example, when a statute that purports to resolve the claims of all interested persons in certain funds or property does not provide constitutionally sufficient procedures to ensure actual notice to all interested stakeholders to the extent practicable, the actual notice of a particular stakeholder becomes irrelevant — it is the statute, not the notice to that stakeholder, that is unconstitutionally defective. *See e.g., Wuchter v. Pizzutti,* 276 U.S. 13, 24 (1928) (where statute does not require adequate procedures for notice, actual notice to a particular individual "cannot . . . supply constitutional validity to the statute or service under it"); *Sterling v. Environmental Control, Inc.,* 793 F.2d 52, 58 (2nd Cir. 1986) ("extrastatutory measures cannot render valid a statute unconstitutional on its face" for lack of adequate notice provisions). Hence, although Mr. Mullane's actual notice did not affect the result in *Mullane, Mullane* does not stand for the proposition that actual notice is insufficient for all purposes in the absence of individual written notice.

In *Mullane* and *Pope*, the Court struck down the *statutes* involved; the Court *did not find* that actual notice was always insufficient unless accomplished by formal paper notice. To the contrary, the Court has held that actual notice can satisfy the requirements of due process irrespective of the absence of formal, personal notice. *National Equipment Rental v. Szukhent,* 375 U.S. 311, 315 (1964).

That actual notice is sufficient to satisfy due process (so long as a facially invalid statute is not at issue) is self-evident. The constitutional requirement that a statute provide for the "best notice practicable" when it seeks to resolve the claims of all persons known or unknown is intended to ensure, to the extent possible, that potentially affected nonparties receive *actual notice.* Where no such statute is involved and the affected nonparties have actual notice, it makes no difference how the actual notice was achieved.

Any other result would be anomalous. Nonparties who did *not* receive notice would nonetheless be bound, so long as

proper procedures were followed, while nonparties with actual notice would not be bound unless proper formal procedures were followed. The law insists on the procedural form only to the extent necessary to ensure the protection of substantive rights. Here, that protection was accorded through the ultimate object of formal paper notice — *i.e.,* actual notice.

In any event, it is actual notice that triggers Rule 24; formal paper notice is not necessary. *NAACP v. New York,* 413 U.S. 345 (1973); Advisory Committee Notes to 1966 Amendments to Rule 19 (stating that "informal notice" is sufficient to enable an absentee to avert prejudice to himself by intervening). This is why paper notice was not a factor in the Court's analysis in *Penn-Central Merger and N&W Inclusion Cases,* 389 U.S. 486 (1968), or *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968), both of which focused upon the failure to intervene despite actual notice. There, as here, the manner in which notice was obtained is irrelevant, for no claims-barring statute is implicated. There, as here, the operative principles of preclusion are not statutory in nature; instead, they arise from equitable principles akin to the doctrine of estoppel. *See* F. James and G. Hazard, *Civil Procedure* § 11.31 at p. 652 (3d ed. 1977). Estoppel has always been premised upon the failure to act in the face of actual knowledge.

III. PRECLUSION FOR FAILURE TO INTERVENE IS BOTH CONSTITUTIONAL AND CONSISTENT WITH ESTABLISHED PRECLUSION LAW

Respondents argue that there is no basis in the decisions of this Court for a theory of preclusion based upon the failure of nonparties to intervene in litigation which implicates their interests, and that any such result necessarily violates due process. In order to make that claim, they strain mightily to distinguish this case from *Penn-Central Merger and N&W Inclusion Cases,* 389 U.S. 486 (1968). In *Penn-Central,* several actions filed in various states challenging the findings of the Interstate Commerce Commission were stayed pending a

determination on the merits of one of the actions filed in New York federal court. Because all plaintiffs were free (though not required) to intervene in the New York suit, this Court held that those plaintiffs who chose not to intervene were nevertheless bound by the result of the New York proceedings:

> All parties with standing to challenge the Commission's action might have joined in the New York proceedings. In these circumstances, it necessarily follows that the decision of the New York court . . . precludes further judicial review or adjudication of the issues upon which it passes.

389 U.S. at 505-506.

Respondents fail in their efforts to distinguish *Penn-Central*. They argue that preclusion of the claims of non-intervenors was justified in the particular circumstances of that case because the "potential scope of litigation seeking review of I.C.C. orders was so great" in that context. Wilks Br. at 23. Yet, the same is true here. The interests of each and every nonminority employed by the defendant are always implicated by every Title VII suit seeking promotional remedies. Particularly where, as here, the defendant is a public employer, nonminority employees will often number in the thousands. If each nonminority employee had an absolute right to file an independent lawsuit to challenge the lawfulness of the remedy once it operated ostensibly to deprive him of a particular employment opportunity, the resulting lawsuits would be legion. Virtually every current and future injunctive decree vindicating public rights would be subject to a labyrinth of interminable relitigation. Here, too, the "potential scope of litigation" is great indeed.

Just as telling is the respondents' ineffectual attempt to distinguish *Penn-Central* on the grounds that the claims of the non-intervening parties in *Penn-Central* were identical to the claims of the parties to the New York proceedings which "were considered on the merits" by the trial court. Wilks Br. at 23-24. Again, the same is true in this case. Here, in the six years since they filed the Reverse Discrimination Litigation, the white employees have not presented *any* argument concerning the lawfulness of the Decrees that was not urged on their behalf at the Fairness Hearing *before* the Decrees were approved. J.A. 735-737. Judge Pointer expressly considered and rejected those arguments, concluding that there was "more than ample" evidence of discrimination and that the Decrees were *not unconstitutional*. Pet. App. at 246a. Here, as in *Penn-Central*, the claims now made by respondents, although asserted by others on their behalf, were considered on the merits and rejected.

Finally, both the *Wilks* respondents and the United States are quick to emphasize that this Court in *Penn-Central* "refused to preclude further proceedings" altogether. They rely on the Court's holding that while the parties to the New York proceeding and those who failed to intervene "were precluded from relitigating the merits of the merger order," the Court left the non-intervenors free "to challenge in court specific steps taken pursuant to the consolidation believed to have detrimental effects upon them." Wilks Br. at 24; U.S. Br. at 14-15, n. 9. However, this tenet of *Penn-Central* also is fully consistent with the City's proposed rule. Under the rule here espoused, nonminority employees who elect not to intervene in the original Title VII litigation would be precluded from relitigating the *lawfulness* of any resulting affirmative action decree. However, they would remain free to challenge any subsequent employment decisions affecting them on other grounds — *e.g.*, on the grounds that the decision is not contemplated (and therefore not protected) by the Decree.

Penn-Central establishes that it is not a violation of due process to bind nonparties to the results of known litigation which seeks to resolve issues in which they claim an interest, so long as the nonparties had an opportunity to intervene in the original proceeding if they wished to do so. This principle finds added support in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), and in the decisions of this Court upholding the Bankruptcy Act and other statutes providing for resolution of the claims of all interested persons in a single proceeding whether or not they choose to assert their claims in that proceeding. *See, e.g., NLRB v.*

Bildisco & Bildisco, 465 U.S. 513 (1983); *New York v. Irving Trust Co.*, 288 U.S. 329 (1933).[1] Moreover, the majority of the courts of appeals which have adressed the issue have recognized the validity and wisdom of applying such a rule in Title VII litigation. Respondents ignore the clear import of this authority.

Finally, the contention that it constitutes a judicial modification of Title VII's statute of limitations to deny nonminority employees "two bites at the apple" is meritless. Requiring nonminority employees to intervene in the original Title VII litigation if they wish to object to the relief sought is fully consistent with Title VII's claims-filing limitation. In enacting 42 U.S.C. § 2000e-5(e)(f), Congress did not intend to guarantee nonminority employees the unfettered right to abstain from participating in Title VII proceedings of which they are aware and file a second, separate lawsuit of their own if the remedy imposed in the first is not to their liking.

Title VII's claims-filing limitation governs the timeliness of an original charge of discrimination. Once a Title VII lawsuit seeking promotional relief is commenced, however, nonminority employees aware of the relief sought know that if plaintiffs are successful (whether by consent decree or by unilateral judgment), race-conscious goals may be used to ensure that more blacks will be promoted to achieve the representation at all levels of employment which would have existed but for the discrimination. From this stage forward, nonminority employees are "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect [their] interest. . . ." Fed. R. Civ. P.24(a).

It defies common sense to contend that Congress nevertheless intended its claims-filing limitation to relieve non-

[1]This is not to say that because it occurs in bankruptcy, it must occur here. The point is that if preclusion for failure to act violated due process, such legislation as the Bankruptcy Act would be unconstitutional; Congress could not permissibly enact legislation requiring that result. Because Congress has, with the approval of the Court, provided that judicial proceedings can resolve the claims of those who elect not to participate, it must necessarily be consistent with due process. Nothing Respondents have said contradicts that simply syllogism.

minority employees of any obligation to assert their objections to the relief in the original litigation, and to guarantee them the right to challenge the lawfulness of such remedies in subsequent lawsuits. Nothing in Title VII supports such a theory. There is no indication that Congress contemplated that the validity of affirmative action remedies resulting from one lawsuit could be attacked in another, and therefore it could not have intended Title VII's filing limitation to have such an effect.

This conclusion finds clear support in the Congressional policy favoring settlement of Title VII claims, *see, e.g., Carson American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981), and in EEOC regulations implementing Title VII. Those regulations recognize that employers are "entitled to rely on orders of courts of competent jurisdiction . . . whether entered by consent or after contested litigation." 29 C.F.R. § 1608.8. The regulations therefore provide that "actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII." *Id.* These regulations implementing Congress' intent squarely foreclose respondents' argument that Title VII's limitations period would be judicially abrogated by a rule precluding non-intervenors with notice from collaterally attacking the lawfulness of action taken pursuant to Consent Decrees.

Respondents' contention that the intervention approach would require them to assert their claims before they have accrued is similarly flawed. To say that no claim has "accrued" at that time begs the question. Where the goals and timetables at issue have been judicially determined to be lawful, no "reverse discrimination" claim can "accrue" from employment decisions contemplated by the decree. Obviously, the question of whether a particular employment decision was within the terms of the decree is one that does not arise until the particular employment decision is made. However, that is not the question respondents are precluded from now litigating under the collateral attack doctrine. The question here is simply *when* the nonminority employees are allowed to challenge the basic lawfulness of the underlying affirmative action relief itself. Clearly, Rule 24 allows them to

do so as soon as such relief is requested by the original minority plaintiffs. Whether or not they have actually been denied promotions or other opportunities at that time, the nonminority employees have *existing* interests (in the availability of promotional opportunities) which are in fact implicated by the relief sought and which can in fact be asserted in opposition to the entry of that relief. There is nothing Draconian in holding that nonminority employees who choose not to object to the lawfulness of relief in the litigation in which it is requested may not revisit that particular issue later.

The flaw in respondents' argument concerning the accrual of their claims is revealed by their own proposed "joinder" approach. Respondents concede that they would have been bound to the result of the original litigation had they been joined pursuant to Rule 19, Fed. R. Civ. P. Wilks Br. at 32-34, 46. Yet, under either joinder or intervention, the nonminority employees are forced to assert their interests before the relief is entered and before any one of them has a promotional opportunity deferred. Neither the joinder approach nor the intervention approach abrogates any claim limitations period, however. Both approaches are permissible means of achieving finality, and neither requires the nonminority employees to assert any interest that is not already existing and threatened at the time the original lawsuit is filed. As a practical matter, however, the joinder approach is so prohibitively burdensome, wasteful and impractical a means of ensuring finality in public rights litigation that it cannot realistically be utilized.

Nor does the fact that the original litigation was concluded by consent decree (after seven years of litigation and two full trials) rather than litigated judgment alter the analysis in any way. *See* Wilks Br. at 44. ("It is wholly unrealistic to require [BRFS employees] to foresee that their employer will settle rather than litigate"). Again, it was the relief sought by the original minority plaintiffs from the outset which threatened to affect directly the existing interests of nonminority employees. Those interests stood to be "impaired or impeded" to the same extent whether affirmative action relief

was awarded by the trial court on its own upon litigated judgment or through a court-approved consent decree.

Significantly, neither the United States nor the Wilks respondents dispute petitioners' claim that they would not have been entitled to relitigate the lawfulness of any remedies ordered by the trial court on its own initiative if the original Title VII claim had been litigated to conclusion in their absence. Having chosen not to assert their objections in the original litigation, respondents legitimately may be deemed to have assumed the risk that remedies affecting their interests might be imposed either upon unilateral judgment or consent decree. The nonminority employees certainly had no right to expect that the employer would defend the case to the bitter end no matter how inevitable the result. Moreover, the nonminorities could not expect the City of Birmingham to continue to ignore the interests of its minority workers. As respondents themselves have admitted, "[f]rom the beginning, the Board and the City represented a wide range of occupations in the public sector and had different cost-benefit settlement interests, and incentives," from the nonminority employees. (Wilks Br. at 21). The nonminorities cannot claim they assumed the risk that the suit might result in affirmative action remedies only if the original suit was litigated to conclusion.[2]

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[2]In any event, as pointed out in the City's initial brief, there is no principled basis upon which to say that preclusion of nonminority employees is consistent with due process if the original Title VII claim is concluded by litigated judgment to which they were not parties, but inconsistent with due process if the original claim is concluded by a court-approved consent decree. As noted by the Eleventh Circuit below, the "same principles of res judicata and collateral estoppel that govern ordinary judgments" govern the preclusive effect of consent decrees. *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498 (11th Cir. 1987). The City submits that in either case, due process permits the conclusion that nonminority employees whose interests are implicated by the affirmative action relief sought by Title VII plaintiffs must assert their objections to the lawfulness of that relief before it is entered in the first place.

IV. JOINDER IS NOT A VIABLE MECHANISM FOR ENSURING FINALITY IN PUBLIC RIGHTS LITIGATION

No party disputes the proposition that finality must be attainable in public rights litigation. Nor has anyone suggested any mechanism for achieving that result other than Rule 24 intervention or Rule 19 joinder. Given those options, the choice is easy. Joinder cannot be utilized in complex public rights litigation without placing intolerable burdens on all concerned and creating impossible dilemmas for the trial court. On the other hand, Wilks' primary objection to intervention centers on due process concerns, concerns which the City has dispelled. The intervention approach is constitutional, and it is the demonstrably superior alternative.

The manifold problems inherent in joinder of every potentially affected nonparty prevent joinder from being a viable means to attain finality in complex public rights litigation. The Wilks respondents completely ignore the overwhelming difficulties, Wilks Br. at 46; the federal government understates them and concludes they must necessarily be tolerated. U.S. Br. at 21.[3] However, respondents have neither rebutted the insurmountable barriers to joinder in public rights litigation identified by the City nor attempted to answer the numerous difficult questions presented by joinder as the sole avenue to finality in such litigation. *See* City Br. at 32-34.

The Wilks respondents contend that the intervention alternative prejudices nonminority employees. They contend, for example, that it will encourage unnecessary participation in litigation and force the nonminority employees of a Title VII defendant to run the risk of liability for the attorneys' fees of the plaintiff class. Of course, the same dangers necessarily obtain if the employer is required to join

[3]The government also argues that the joinder approach is consistent, and the intervention approach inconsistent, with the Federal Rules of Civil Procedure. U.S. Br. at 18. The City has already demonstrated that the converse is true. City Br. at 29-35.

all potentially interested nonparties in order to achieve finality. Similarly, respondents complain that under the City's rule an intervening nonminority employee would be forced to incur the expenses of hiring counsel to assert claims before losing any promotion or suffering direct injury. Yet if joinder were required to achieve finality, *every* nonminority would be forced to incur those same expenses at the same stage. At least under the City's rule, the choice of whether to participate is left to each individual employee.

The same is true of every colorable objection that respondents assert in opposition to the intervention approach: the same difficulty exists, to an equal or greater degree, under the joinder approach. To the extent nonparties are inconvenienced or disadvantaged by the requirement that they participate in the original litigation, mandatory joinder forces that participation on all of them. Intervention, on the other hand, allows each affected nonparty to make his own decision as to whether the possibility of detriment warrants an investment of time and expense in litigation. Additionaly, as shown in the City's initial brief, joinder creates serious difficulties not shared by intervention.

V. UNDER THE FACTS OF THIS CASE, RESPONDENTS SHOULD BE PRECLUDED FROM RELITIGATING THE LAWFULNESS OF THE CONSENT DECREES

Respondents cry that preclusion would violate due process because notice of the Fairness Hearing was ineffectual and "no adequate hearing was provided." Respondents' emphasis on the Fairness Hearing misconceives the full import of the City's argument. While the Fairness Hearing itself provided the process that was due, respondents were accorded due process long before the Fairness Hearing. Respondents had *notice* of the original litigation and the *opportunity* to participate fully in all aspects of that litigation through intervention. That is all due process requires.

From the outset of the litigation in 1974, the white firefighters were on notice that if plaintiffs obtained the

relief they demanded, blacks would be hired and promoted to achieve the representation at all levels of employment that would have existed but for discrimination in the existing system. One unambiguous *purpose* of the litigation was to establish promotional opportunities for blacks who had previously been excluded even from consideration for promotion — a result that would necessarily reduce the number of promotions which would otherwise have been allocated exclusively to whites under the pre-Decree selection methods. From the moment the original suit was filed, the white firefighters had "an interest relating to . . . the subject of the action" and were "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect [their] interest." Rule 24, Fed. R. Civ. P. It was therefore incumbent upon them to intervene in the original litigation if they wished to assert any objections to the relief sought. Yet, despite knowledge of the pendency and import of the litigation, the white firefighters elected not to participate.

The victory of the black plaintiffs in the first trial — addressing entry level examinations — provided additional impetus to intervene. (J.A. 553) The judgment of the trial court following the first trial (affirmed on appeal) put respondents on notice that: 1) defendants had discriminated against blacks at the entry level, which necessarily had an impact on blacks' promotional opportunities, in and of itself a sufficient basis for affirmative promotional remedies; 2) the Board's validation methodology was deficient, indicating that the promotional examinations would ultimately be held invalid, since they were developed under the same procedures as the entry level examinations struck down in the first trial; and 3) the trial court was prepared to award the affirmative action relief sought by the plaintiffs. At that point, the possibility that the discrimination litigation would affect the interests of white male employees became a likelihood. Yet, they again elected not to participate in the litigation.

The white employees thus remained voluntarily absent from the second trial in August, 1979 concerning promotional practices alleged to be discriminatory against blacks and women. *See, e.g.,* DX 1428 and 1429, R10-1280-81. While he completed only a portion of his opinion after the trial, Pet. App. 237a, Judge Pointer unequivocally indicated that the evidence established pervasive discrimination that would have justified injunctive releif in any event:

> While the only judicial finding of discrimination thus far entered has been with respect to the effect upon black applicants of the Personnel Board's tests for police officer and firefighter, it can hardly be doubted that there is more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would be in time held liable for discrimination against blacks at higher level positions in the police and fire departments and for discrimination against women at all levels in those departments. The proposed consent decrees, by way of settlement for such potential liability, provide appropriate corrective measures reasonably commensurate with the nature and extent of the indicated discrimination.

Pet. App. 244A.

The facts show that respondents had an almost five-year opportunity to intervene and protect their interests. Their entitlement to a hearing was neither absolute nor inalienable; the *opportunity* for a hearing is all due process bestows. Before the Fairness Hearing was even on the horizon, respondents had an opportunity over the course of several years to intervene in the original litigation and thereby enjoy the full panoply of rights accorded parties.

The Fairness Hearing gave respondents an opportunity to have their objections considered despite their decision to remain nonparties. It certainly provided "an opportunity for a hearing appropriate to the nature" of this case. Especially given seven years of known litigation in which the observant but silent white firefighters failed to intervene, and given the irrebuttable evidence of discrimination developed in that litigation, the Fairness Hearing provided an opportunity to be heard that was fully appropriate to the nature of their objections.

Respondents complain that they were "not able to engage

in discovery, [and] could not call witnesses or offer evidence. . . . " Wilks Br. at 30. Not true. Respondents cannot claim they were denied those opportunities because they *never* sought those opportunities. Indeed, the trial court solicited evidence from the objectors — but they expressly declined to present any. J.A. 732. If respondents, in restrospect, received less of a hearing than they now believe desirable, it was due exclusively to their failure to seize the ample opportunities for such a hearing. Given the additional opportunities they deliberately bypassed, the Fairness Hearing was a constitutionally adequate hearing appropriate to the nature of the objections there argued on behalf of the white firefighters. Respondents were accorded the right to present every argument at their disposal, and they exercised that right. To this day, respondents have not asserted any argument challenging the validity of the Decrees that was not made at the Fairness Hearing.

In light of these facts, it is evident that the white firefighters received all the process they were due under the circumstances of this case. The objections to the lawfulness of the Decrees which they now urge were presented on their behalf to the trial court through their present counsel before the Decrees were approved, and were rejected on the merits. If they wished the right to conduct discovery and develop evidence to support their objections, that opportunity was available. They had only to intervene at a reasonable point in advance of either of the two trials, and they would have then enjoyed all the procedural rights accorded to those who are parties in litigation, including the right of appeal. That they deliberately elected not to avail themselves of that opportunity does not demonstrate any deficiency in the process accorded them.[4]

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[4]*See, Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982), holding that the Due Process Clause contemplates "reasonable procedural requirements for triggering the right to an adjudication," and a court "certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." The timeliness requirement of Rule 24 is certainly a reasonable procedural rule, and it is evident that the white firefighters failed to comply with that requirement.

Preclusion in these circumstances is clearly authorized by decisions of this Court, decisions which predated the deliberate choice made by respondents. *See e.g., Penn-Central Merger & N&W Inclusion Cases,* 389 U.S. 486 (1968); *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968). *See also Cummins Diesel Michigan, Inc. v. The Falcon,* 305 F.2d 721, 723 (7th Cir. 1962); *Black & White Children v. School District,* 464 F.2d 1030 (6th Cir. 1972); *Prate v. Freedman,* 430 F.Supp. 1373 (W.D.N.Y. 1977), *aff'd,* 573 F.2d 1294 (2d Cir. 1977), *cert. denied,* 436 U.S. 922 (1978).

As this Court explained in *Patterson,* if the white employees are now held to be foreclosed from relitigating the lawfulness of the Decrees, they "will not have been prejudiced by the failure of the District Court here to order [them] joined," but by their own failure to intervene. *Patterson,* 390 U.S. at 115. Whatever additional opportunities respondents might otherwise have had were "lost by [their] own inaction." *Id.* at 114. As the Eleventh Circuit reasoned in rejecting their attempt to intervene as untimely, the "BFA members, having made an apparently ill-advised decision to rely on others to advance their interests, knowing that they could be adversely affected, cannot now be heard to complain." *United States v. Jefferson County,* 720 F.2d 1511 (11th Cir. 1983), J.A. 155. It will be ironic indeed if respondents are rewarded rather than estopped for their inaction.

CONCLUSION

For the reasons cited above and in the City's initial brief, this Court should reverse the decision of the Eleventh Circuit and remand with instructions that these cases be dismissed as impermissible collateral attacks. The respondents chose to remain nonparties although they knew the original litigation implicated their interests. The objections to the lawfulness of the Consent Decrees which they now seek to make were made on their behalf before the Decrees were entered, and were rejected on the merits. At this point the City is due a

decision in its favor and an end to fourteen years of costly litigation.

Respectfully submitted,

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1988

JOHN W. MARTIN, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,
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ROBERT K. WILKS, *et al.*,
Respondents.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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October 24, 1988

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ARGUMENT

The interests of Birmingham's nonminority employees were considered at every turn before the consent decrees were entered. The parties to the consent decrees considered those interests when they drafted the decrees; they invited all interested persons to present their interests before the decrees went into effect; nonminority employees did present their views (through respondents' present counsel, who presented the same arguments he presented on their behalf in this action); and the district court, after considering those interests, found that the decrees satisfy Title VII and the Equal Protection Clause. *See* Pet. App. 240a-45a. The City, in reliance on the court's approval of the decrees, is now well under way in remedying the effects of its discrimination. [1] This Court should put an end to respondents' continuous attempts to relitigate in this collateral action issues that have already been litigated and lost.

The respondents' briefs are revealing in what they do not say. Neither the Wilks Respondents nor the United States disputes that the claims raised in the reverse discrimination actions are identical to the objections raised by Mr. Fitzpatrick at the fairness hearing and considered by the district court before it approved the decrees. *See* Martin Br. at 28 n.23; Pet. App. 240a-45a. [2] Nor do they claim to have been unaware of the

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1. The Wilks Respondents try to rewrite history by asserting that Birmingham is not "a recalcitrant employer of the sort found in *United States v. Paradise*". Wilks Br. at 2 n.5. However, the employment statistics introduced at trial speak for themselves, particularly the fact that *not one* black employee had been promoted to the positions at issue here before the entry of the consent decrees despite the fact that, as the Wilks Respondents acknowledge, the "majority of the citizens of Birmingham . . . are black". Wilks Br. at 2 n.5; J.A. 439-44. The effects of Birmingham's discrimination linger. Indeed, the district court found that intentional discrimination against blacks has been ongoing—the chief engineer preferred plaintiff Mr. Ware for promotion precisely because Mr. Ware is white. Pet. App. 31a, 56a, 80a-81a, 100a-01a. Moreover, the Wilks Respondents contended below that *every* promotion of a minority employee in the Fire Department pursuant to the decrees violated Title VII and that they should have been promoted instead. According to the Wilks Respondents, there should still be *no* minority Fire Department supervisors.

2. The Wilks Respondents claim that the BFA "cannot act as the surrogate for the [nonminority] employees" because it "represents a broad

prior litigation or the proposed consent decrees. That alone disposes of most of respondents' arguments.

Respondents build a straw man, citing discussions of consent decrees where there was neither notice nor a hearing. But that is not this case. [3] Where, as here, (1) there was notice to nonparties, (2) there was a hearing where nonparties were invited to appear, and (3) the court carefully considered the interests of those nonparties, then the decree cannot be attacked in collateral proceedings. Those three facts make these consent decrees far more than a mere contract signed by a judge. *Compare Ashley v. City of Jackson*, 464 U.S. 900, 902 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from the denial of *certiorari*). [4] The fact that respondents raise no new

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spectrum of employees, black and white". Wilks Br. at 45. In fact, the BFA has *never* represented the interests of minority employees in this litigation. It has consistently done the opposite, from assisting the Personnel Board in defending the prior lawsuits (J.A. 772-73) to challenging the proposed decrees at the fairness hearing. *See* J.A. 699-713, 732-40, 770.

3. The Wilks Respondents assert that "many appeals courts have also refused to bind nonparties to the provisions of consent decrees". Wilks Br. at 20 n.20. In most of those cases, however, there was neither notice nor a hearing, unlike this case. *See McAleer v. American Tel. & Tel.*, 416 F. Supp. 435, 436 (D.D.C. 1976) ("nor were [nonminority employees] invited to participate in any way"); *Reeves v. Wilkes*, 754 F.2d 965, 969 (11th Cir. 1985) ("nor were [nonminority employees] provided notice of the decree's implementation or terms"); *United States v. City of Jackson*, 519 F.2d 1147 (5th Cir. 1975) (consent decree was entered three days after being proposed); *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826, 834, 836 (5th Cir. 1975) (the court "signed and entered the [consent decree] documents later that same day" on which they were filed, and the decree expressly did not "prevent the institution or maintenance of private litigation"), *cert. denied*, 425 U.S. 944 (1976). In two other cases they cite, the outcome was compelled by a specific rule not applicable here. *See United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969) (§ 5(a) of the Clayton Act, 16 U.S.C. § 16(a), expressly provides that consent decrees in government antitrust actions shall have no collateral estoppel effect), *aff'd in part and appeal dismissed in part on other grounds sub nom. Grossman v. Automobile Mfrs. Ass'n*, 397 U.S. 248 (1970); *Madison Square Garden v. Shavers*, 562 F.2d 141 (2d Cir. 1977) (injunction entered against a nonparty in contravention of Fed. R. Civ. P. 65(d)).

4. Respondents do not dispute that in *Ashley*, unlike here, the consent decree was entered three days after the lawsuit was commenced, thus denying nonparties the opportunity to be heard prior to its entry. *See* Martin Br. at 17-18.

claims in these collateral attacks and do not claim to have been unaware of the proposed decrees makes petitioners' rule even more compelling.

The Wilks Respondents belittle Judge Pointer's approval of the decrees as a "cursory review of facial reasonableness". Wilks Br. at 16. That is belied by the record; it was neither a "cursory review" nor "of facial reasonableness". Rather, Judge Pointer said that he "reviewed with care" the decrees, as demonstrated by the fairness hearing and his 1981 opinion. *See* Pet. App. 236a-46a; J.A. 727-71. And far from "facial reasonableness", he reviewed the very same objections to the decrees that are made in this action. [5] That disposes of these points summarily:

- Respondents contend that the parties "would be better occupied by concentrating their efforts toward the construction of valid affirmative action plans". Wilks Br. at 48; *see also* U.S. Br. at 11. The parties to the decrees (including the United States) did construct such a valid plan; Judge Pointer found the decrees to be valid over Mr. Fitzpatrick's objections in 1981 and again in 1985.

- They contend that in *W. R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), the Court "refused to preclude nonminority employees from seeking redress for discriminatory practices taken pursuant to court orders". Wilks Br. at 20. [6] The practices there

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5. The Wilks Respondents also assert that Judge Pointer applied a "reasonableness" standard rather than strict scrutiny. *See* Wilks Br. at 5-6. Again, that is belied by the record. In 1981, Judge Pointer applied the same five factors applied by this Court for reviewing affirmative action plans: (1) the "duration of the remedy"; (2) the "relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force"; (3) "waiver provisions"; (4) the "effect of the [remedy] upon innocent third parties"; and (5) the "efficacy of alternative remedies". *Compare* Pet. App. 241a-45a, *with Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 486 (1986) (Powell, J., concurring) ("*Sheet Metal Workers*"); *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion).

6. They also cite *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). Wilks Br. at 20. That issue was never raised in *Wygant*.

were not taken pursuant to a court order. 461 U.S. at 768. This Court was merely enforcing an arbitrator's decision, and, in contrast to Judge Pointer's review of the decrees here, noted that it was "*not entitled to review the merits of the contract dispute*". *Id.* at 764 (emphasis added). *See also* pp. 11-12, *infra*.

- They try to distinguish *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486 (1968), on the ground that the City's actions were not the result of "the considered judgment of a court". Wilks Br. at 25. In fact, they were. *See also* pp. 8-9, *infra*.

- They point to this Court's statement that the "fact that *the parties have consented* to the relief contained in a decree does not render their action immune from attack". *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 526 (1986) (emphasis added) ("*Local 93*"); *see* Wilks Br. at 35. Obviously *consent* does not immunize a consent decree, since voluntary affirmative action plans may properly be challenged. *See, e.g., Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987). Rather, it is the *court's approval* after notice and a hearing that bars these collateral attacks.[7] *See also* pp. 14-15, *infra*.

Respondents' remaining points are no more persuasive:

I. CONTRARY TO RESPONDENTS' CONTENTION, THE PROPER PROCEDURE FOR NONPARTIES WITH NOTICE OF A PROPOSED CONSENT DECREE TO CHALLENGE THAT DECREE IS INTERVENTION RATHER THAN JOINDER OR A COLLATERAL ATTACK.

All of the parties agree that nonminority employees should have an opportunity to challenge race-conscious relief. The

7. Although this Court also said in *Local 93* that a "court's approval of a consent decree between some of the parties cannot therefore dispose of the claims of nonconsenting intervenors" (478 U.S. at 529), none of the authorities cited for that proposition involved situations where the district court considered the intervenor's objections before approving the decree. Presumably it is *mere* approval to which this Court was referring. *See id.* at 529. Here, not only did the Wilks Respondents fail to intervene, but the objections they raised were carefully considered by the consent decree court. Pet. App. 238a-46a. *Mere* approval is not an issue here.

dispute is what form that opportunity must take. Respondents believe that collateral attacks should not be barred, but they do not seriously argue that collateral attacks serve any useful or beneficial purpose other than as a vehicle for such an opportunity.[8] That is for good reason—collateral attacks contravene fundamental policies of judicial efficiency, repose, finality and comity. *See* Martin Br. at 20-32. In the alternative, respondents argue that nonminority employees should have been joined under Rule 19. The better rule, however, is to require a challenge to be raised at the fairness hearing or through timely intervention.

A. The Parties to a Proposed Consent Decree Are Not Required To Join Nonminority Employees in the Litigation.

Respondents argue that the only way that the validity of the decree can be resolved in one proceeding is to join all nonminority employees. *See* Wilks Br. at 16-17, 46; U.S. Br. at 10, 15-16. This is the very first time that they have raised that argument, and it is particularly ironic that the United States agrees. Although it was a party to the prior litigation and to the consent decrees, the United States now argues in the third person:

> "The parties in the initial litigation did not attempt to join the *Wilks* respondents as parties to *their* litigation—and did not seek their approval of the consent decree—despite *their* knowing full well that the proposed settlement would adversely affect such nonparties' interests." U.S. Br. at 15-16 (emphasis added).

The United States never sought to join nonminority employees, presumably because nonminority employees are not indispensable parties under Rule 19(b) in Title VII litigation.[9]

8. The Wilks Respondents do say that collateral attacks provide a means to "police" the implementation of a decree (Wilks Br. at 40-41), but it is to achieve that end that the district court retains jurisdiction over the decrees. *See* Pet. App. 150a, 228a.

9. The United States's joinder argument is but an example of how it ignores the past. It would like the Court to believe that it "recognizes that the consent decrees require it to defend their validity" (U.S. Br. at 8 n.6), but it has not done so. Despite its promise in the decrees to "*defend* the lawfulness of such remedial measures in the event of challenge by intervention

They are not indispensable at the outset, even when the complaint seeks race-conscious relief. [10] And the fact that such race-conscious relief is later ordered, either after a trial (as it was here after the 1976 trial (J.A. 588-89)) or in a consent decree, does not suddenly change their interests and make them indispensable. Indeed, no court has ever required the joinder of nonminority employees when a consent decree was proposed. *See* Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. Chi. L. Rev. 147, 176 n.123 (1986).

The United States argues that the Federal Rules make joinder mandatory while intervention is permissive. *See* U.S. Br. at 18-19. According to the Advisory Committee Notes to Rule 19, however, there is no such preference: "*the absentee may sometimes be able to avert prejudice to himself by* voluntarily appearing in the action *or intervening on an ancillary basis*". Fed. R. Civ. P. 19, Advisory Committee Notes to the 1966 amendments (emphasis added). The Notes make clear that the rule is permissive. "In some situations it *may be desirable* to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court *in its discretion may* itself *convey* this information by directing a letter or other informal notice to the absentee". *Id.* (emphasis added). In addition, Rule 24 was amended to ensure that "an applicant

or collateral attack" (Pet. App. 125a, 205a (emphasis added)), the United States *supports* the Wilks Respondents' collateral attack in this Court. In fact, the United States did not introduce at trial one shred of evidence to defend the decrees' validity.

10. *See Kirkland v. New York Dep't of Correctional Servs.*, 520 F.2d 420, 424, (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); *Eaton v. Courtaulds North America, Inc.*, 16 Fed. R. Serv.2d 1115, 1116 (S.D. Ala. 1972); *Todd v. Joint Apprenticeship Comm.*, 223 F. Supp. 12, 18 (N.D. Ill. 1963), *vacated as moot*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); *Spirt v. Teachers Ins. & Annuity Ass'n*, 416 F. Supp. 1019, 1022-23 (S.D.N.Y. 1976); *Atkinson v. Owens-Illinois, Inc.*, 9 Empl. Prac. Dec. (CCH) ¶ 10,155 (N.D. Ga. 1975). *See also Arthur v. Starrett City Assocs.*, 89 F.R.D. 542, 548 (E.D.N.Y. 1981) (refusing to dismiss in the absence of HUD because HUD could protect its interests by intervening or filing an *amicus* brief); *Smith v. Baltimore & O. R.R.*, 473 F. Supp. 572, 584 (D. Md. 1979)(nonparties' failure to intervene in highly publicized litigation "indicate[s] that they do not feel that their interests are being threatened" and therefore supports the denial of compulsory joinder).

is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i)". Fed. R. Civ. P. 24, Advisory Committee Notes to the 1966 amendments. There would have been no reason for that amendment if the drafters had expected that such a person must be joined.[11]

Finally, as noted in other briefs, joinder of nonminority employees in consent decree cases would present overwhelming practical difficulties—multiplying the number of parties, attempting to bind persons who do not want to be bound, joining an involuntary defendant class, and allocating attorneys' fees. *See* City Br. at 32-34; Nat'l League of Cities Br. at 24-26; NAACP LDF Br. at 20-23; Brief of Alabama, et *al.* at 48-55. Even commentators upon whom respondents rely acknowledge those difficulties:

> "The effects of a consent decree may ripple outward, with smaller and smaller effects on more and more people, many of whom cannot feasibly be joined. *Injunctive litigation could rarely proceed if it were necessary to join every third party who might be affected.*" Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. Chi. Legal F. 103, 121 (emphasis added); *accord* Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. 101, 117-18 (Nov. 1988) (forthcoming).

The difficulty of trying to identify for joinder purposes every potentially interested person is well illustrated by *Marino v. Ortiz*, 108 S. Ct. 586, 587 (1988) (per curiam), where a consent decree was challenged by persons who were not affected by it.

B. The Wilks Respondents Should Have Intervened Timely Rather Than Brought This Collateral Attack.

11. This Court too has rejected the argument that joinder should be preferred over intervention. In *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), the Court said that if the nonparty "is properly foreclosed by his failure to intervene in the present litigation, *then the joinder issue . . . vanishes*, for any rights of [the nonparty] have been lost by his own inaction." *Id.* at 114 (emphasis added).

1. This Court has held that a nonparty who was aware of litigation but did not intervene may be precluded from bringing a collateral attack, and respondents have not distinguished those decisions.

In *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. at 505, this Court held that a nonparty's failure to intervene in litigation of which it was aware precluded it from challenging the resulting judgment. The Court suggested, without deciding, the same result in *Provident Tradesmens Bank & Trust*, 390 U.S. at 114. *See* Martin Br. at 15-18. Respondents have devoted considerable effort to distinguishing those cases (*see* Wilks Br. at 23-26; U.S. Br. at 14-16), but have not succeeded. [12]

Respondents begin by trying to paint *Penn-Central* as *sui generis*. They correctly point out that it arose from a "unique program" involving "competing interests" to reorganize the railway system. Wilks Br. at 23; U.S. Br. at 14 n.9. But the same is true here. The consent decrees represent a comprehensive plan to remedy the effects of Birmingham's discrimination without unduly trammeling the competing interest of nonminority employees. The *Penn-Central* reorganization's "uniqueness" does not alter this Court's holding that it is appropriate and constitutional to bar nonparties who knowingly failed to intervene from collaterally attacking a judgment.

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12. The United States also argues that "nonparties can refrain from intervention in litigation that affects them", citing four decisions of this Court. *See* U.S. Br. at 18 & n.13. One of those cases—*Gratiot County State Bank v. Johnson*, 249 U.S. 246, 249-50 (1919)—was decided under the Bankruptcy Act, not the Rules of Civil Procedure. Although the Court noted that a nonparty's intervention was "permissive, not mandatory", it went on to say that "[w]hether he does so or not, *he will be bound, like the rest of the world, by the judgment*" on the issues decided by the court. *Id.* at 249 (emphasis added). Two other decisions—*Sea-Land Servs. v. Gaudet*, 414 U.S. 573, 593 (1974), and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969)—have absolutely nothing to do with intervention. In the final decision—*Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431 (1934)—the Court noted that there "the facts and considerations affecting the [nonparty's] rights *may be different from those presented* to the state court on behalf of" the named party. *Id.* at 438-39 (emphasis added). In contrast, here the very same arguments raised in these reverse discrimination cases *were presented* to—and were considered by—the district court before it approved the decrees. *See* pp. 1-4, *supra*.

Respondents also point to the special statutes (whose relevance is not apparent) adopted to facilitate the *Penn-Central* reorganization. *See* Wilks Br. at 23; U.S. Br. at 14 n.9. In that procedural morass, one fact starkly stands out—there is no indication that the nonparty was served with notice of the first litigation. *See* 389 U.S. at 505. Rather, just as the "BFA members . . . knew at an early stage in the proceedings that their rights could be adversely affected" (J.A. 154), the Borough of Moosic was obviously aware of the New York proceedings. That awareness, without formal notice, was constitutionally sufficient to prevent it from attacking the *Penn-Central* judgment.

Nor has the United States distinguished *Provident Tradesmens Bank & Trust*, 390 U.S. 102. It argues that "the Court did state that since the arguably indispensable party was 'never before the [district] court, he cannot be bound by the judgment rendered,' *i.e.*, the judgment would not be '*res judicata* as to, or legally enforceable against, a nonparty'". U.S. Br. at 15 n.9 (*quoting Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 110 (footnote omitted)). True enough, but that passage obviously refers to *res judicata* or *claim* preclusion. This case concerns precluding the relitigation of *issues*—the validity of the decrees—under the doctrine of collateral estoppel. *See also* p. 14, *infra*. Moreover, although the United States correctly notes that the Court said that the nonparty "'may still claim that as a nonparty he is not estopped by that judgment from relitigating the issue'" (U.S. Br. at 16 n.9 (*quoting Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 114)), it does not mention that in the next sentence the Court said that the nonparty nonetheless may be estopped with respect to an issue previously determined "because . . . he had purposely bypassed an adequate opportunity to intervene". 390 U.S. at 114. This is just such a case.

2. The Wilks Respondents had an interest to intervene that was legally sufficient and apparent.

The Wilks Respondents argue that they could not have intervened before the fairness hearing because their interests were "speculative at best". Wilks Br. at 44. That is simply wrong.

In numerous Title VII actions, nonminority employees have recognized their interests and sought to intervene, often prior to settlement negotiations, and those motions, if not too late, have been routinely granted. [13] Here, the BFA and several nonminority employees certainly appreciated their interests because they filed objections to the decrees and appeared at the fairness hearing. *See* J.A. 699-716. When Mr. Gray sought to intervene, he expressed the obvious interest that he shared with the Wilks Respondents and the City's other employees—the desire for a promotion in the future. *See* J.A. 775. That interest is protectable.

3. The Wilks Respondents' argument is inconsistent with the record.

We argued in our opening brief that, having foregone the opportunity to intervene timely, the Wilks Respondents should not be permitted to bring a later collateral lawsuit. *See* Martin Br. at 18-19. Their response is to miscast the record.

First, they argue that they pursued their claims in these actions in reliance on the Eleventh Circuit's decision in *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983). Wilks Br. at 7 n.10; *see also* J.A. 158. There was such no reliance. The *last* of the reverse discrimination actions at issue here was commenced more than three months *before* the *Jefferson County* decision. *See* J.A. 134, 149.

Second, they assert that the BFA sought to "intervene *several weeks* prior to the entry of the 1981 consent decrees". Wilks Br. at 48 (emphasis added). In fact, they sought to intervene 17 days before the decrees were entered. *See* J.A. 774-76; Pet. App. 247a-49a. More importantly, although they had known of the litigation for many years and of the proposed decrees for more than seven weeks, they moved to intervene the day *after* the fairness hearing—after the validity of the decree had been briefed, after the hearing had been held and after the issue had been submitted for decision. The district court held that they were too late and the Eleventh Circuit agreed. *See* Pet. App. 246a; J.A. 155.

C. The Policy Reasons for Precluding These Collateral Attacks Are Compelling.

1. Consent decrees do not improperly encourage employers to shift the costs of their wrongdoing to nonminority employees.

Respondents argue that consent decrees improperly encourage employers to shift the costs of their past discrimination to nonminority employees. Wilks Br. at 36-40; U.S. Br. at 25. The Wilks Respondents go so far as to request "damages to the nonminority employees harmed by the process of implementation of the settlement". Wilks Br. at 49. [14] However, there is no liability, and therefore no obligation to pay damages, for implementing race-conscious relief unless that relief "*unnecessarily* trammel[s] the interests of the white employees". *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (emphasis added). *See also Johnson*, 107 S. Ct. at 1451, 1455. [15] Moreover, although the remedy for discrimination may have some burden on nonminority employees, they benefitted from that discrimination in the past.

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13. *E.g.*, *Howard v. McLucas*, 782 F.2d 956, 960 (11th Cir. 1986) (abuse of discretion to deny motion to intervene made before fairness hearing); *Vanguards v. City of Cleveland*, 753 F.2d 479, 481 (6th Cir. 1985), *aff'd on other grounds sub nom. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986).

Although the United States argues that the lower courts have applied "strict rules concerning timeliness of intervention" (U.S. Br. at 26 & n.24), one of the commentators it relies upon says exactly the opposite: "In general, courts have been *fairly lenient* in allowing parties time to intervene after they should have known that intervention was necessary." Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. at 124-25 (emphasis added).

14. Respondents rely upon *W. R. Grace*, but that reliance is misplaced. *See* Wilks Br. at 37-38, 49; U.S. Br. at 25, 29 n.26. There, the Court held that an employer must pay damages to nonminority employees because it had signed a contract (an arbitrator found) obligating it to do so. *See* 461 U.S. at 762-66. There is no such contract here.

15. The United States argues that the court of appeals has instructed the district court on remand to review the consent decrees with the "'heightened scrutiny' required by *Johnson*". U.S. Br. at 7 n.6; *see also* Pet. App. 20a. That standard is from whole cloth. "Heightened scrutiny" does not appear in the *Johnson* opinion.

Nor do consent decrees "encourage" employers to exceed the bounds of Title VII. Indeed, they have exactly the opposite effect. As the parties know when they draft a decree, if they wish to bind nonparties, it must be approved by a court after objectors and intervenors have had an opportunity to argue their case, just as was done here. *See* Pet. App. 236a-49a.

2. Collateral attacks on consent decrees approved after notice and a hearing violate settled principles of comity.

Collateral attacks infringe the respect that courts accord to prior judgments, create the risk of inconsistent obligations, waste judicial resources and are inconsistent with the finality accorded to fully litigated judgments. *See* Martin Br. at 22-29. That harm is even greater where, as here, the collateral attacks seek an order enjoining defendants from "[e]nforcing or complying with" the court-ordered consent decrees. Pet. App. 115a; J.A. 98, 133.[16] And respondents do not answer, or even refer to, our argument that there is no principled basis for allowing third parties to challenge these consent decrees but not fully litigated judgments. *See* Martin Br. at 28-30. *See also Bergh v. Washington*, 535 F.2d 505, 507 (9th Cir.) (Kennedy, J.), *cert. denied*, 429 U.S. 921 (1976).

Respondents rely on the fact that the cases here were all transferred to Judge Pointer, thus (they assert) reducing the risk of inconsistent judgments. *See* Wilks Br. at 42-43; U.S. Br. at 23-24.[17] Yet in the next breath, they complain that these

16. The Wilks Respondents argue that in *W. R. Grace*, "the Court held that the employer could not avoid liability to its innocent employees despite the fact that its conduct was mandated by the conciliation agreement and a district court injunction". Wilks Br. at 37. They are wrong. In truth, the Court said that, unlike the relief sought here, nothing in the conciliation agreement (the relief obtained) required the defendant to violate the court order. *See* 461 U.S. at 768. Indeed, the Court expressed "*doubt* that the District Court in this case ordered specific performance of the conciliation agreement *or granted any other type of injunctive relief*". *Id.* at 768 n.11 (emphasis added). In addition, the Court relied on the fact that the plaintiff sought only money damages and, unlike the Wilks Respondents, not an order enjoining compliance with a prior court order. *See* 461 U.S. at 766-70.

17. The Wilks Respondents claim that two of the reverse discrimination actions were transferred to Judge Pointer "pursuant to an agreement between the judges". Wilks Br. at 8. That is not true. Judge Acker *denied* repeated motions to transfer those cases to Judge Pointer. *See* J.A. 138-40, 144-48, 162-64, 188-93, 196-201. The cases were not consolidated until eight months later by order of Judge Pointer, and they were assigned to him pursuant to local rule because the first-filed collateral attack had been *randomly* assigned to him. J.A. 207.

cases were all before Judge Pointer, saying that "a district court is inclined to protect the decree it previously entered". Wilks Br. at 41 n.28. That illustrates why a plaintiff challenging a consent decree will try to avoid transfer at all costs.[18] Even if the collateral attack were transferred, it would still call upon a court to reconsider afresh a judgment entered in another action without any showing that the prior process was improper.

The United States argues that comity will not be undermined because "principles of stare decisis and comity will *inform* the second court". U.S. Br. at 24 (emphasis added). That begs the question. Either the second court is bound by the first court's determination or it is free to reconsider that judgment. If it can reconsider the judgment *de novo* in a collateral attack, comity is of little use in avoiding protracted litigation and, perhaps, a conflicting result. That is well illustrated by *Feller v. Brock*, 802 F.2d 722, 725-26 (4th Cir. 1986), where the second district court was "informed" of the first court's order but issued an inconsistent order anyway.

The United States also argues that "the concern for correctness of judicial decision making is as important as the concern for consistency". U.S. Br. at 24.[19] That argument, for which they cite no authority, assumes that the second court is more likely to decide the issue "correctly". There is no basis for that assumption; indeed, the first court is at least as likely to be "correct" since it should have considered all of the relevant facts and circumstances before approving the proposed decree. And as one commentator points out, "[i]f neither judge

18. It is ironic indeed that the Wilks Respondents now argue that "all litigation concerning consent decrees is best channeled to the court and judge which initially entered the consent decrees". Wilks Br. at 42. Not only did they oppose motions to consolidate the cases before Judge Pointer, but they sought reconsideration of the decision granting those motions. *See* J.A. 196-201, 208-17.

19. *But see Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("[i]n most matters it is more important that the applicable rule of law be settled than that it be settled right").

ends the tennis match, [the employer] will be subject to conflicting obligations under the threat of contempt from two courts". Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. at 114.

3. Prohibiting collateral attacks does not alter substantive rights.

The Wilks Respondents argue that barring their collateral attacks would "reduc[e] the statute of limitations", thus "alter[ing] substantive rights of nonparties" in violation of the Rules Enabling Act, 28 U.S.C. § 2072. Wilks Br. at 33. This Court has refused, however, to treat statutes of limitations as "substantive rights" under the Rules Enabling Act. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 556-59 (1974). That is because "the choice made by the drafters of the Federal Rules in favor of a discretionary procedure affects only the process of enforcing litigants' rights and not the rights themselves". *Burlington Northern R.R. v. Woods*, 480 U.S. 1, 8 (1987). Nor would petitioners' rule require the "assertion of claims before they mature" as the Wilks Respondents contend. *See* Wilks Br. at 33. Rather, they remain free to assert discrimination claims, but to the extent that those claims concern the affirmative action plan embodied in the consent decrees, they are estopped from relitigating the validity of that plan. *See Blonder-Tongue Labs. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1971) (plaintiff estopped from relitigating validity of its patent). *See also* p. 9, *supra*.

D. This Court Did Not Condone Collateral Attacks in *Local 93*.

The court of appeals below, and respondents here, erroneously rely upon this Court's decision in *Local 93*, 478 U.S. 501. *Local 93* neither holds, nor even suggests, that a collateral attack may be brought under these circumstances.[20] This Court expressly *did not decide* in *Local 93*, a consent decree proceeding, whether the union could raise its Title VII claims.

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20. Although the Court said that a consent decree "may not impose duties or obligations on a third party without that party's agreement" (478 U.S. at 529), that merely repeats the rule that an injunction cannot impose a duty or obligation on a person other than a party and persons acting in concert with that party. *See* Fed. R. Civ. P. 65(d); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. at 112. The consent decrees here impose no duty or obligation on the Wilks Respondents.

"Whether it is now too late to raise such claims . . . must be presented in the first instance to the District Court". 478 U.S. at 530. In concurring, Justice O'Connor said that she "agree[d] with the Court" that the issue must be considered "on remand". *Id.* at 531. The Court plainly meant that this issue was to be raised, if at all, in the consent decree proceeding itself, not a separate action.[21]

II. THE WILKS RESPONDENTS DO NOT HAVE A DUE PROCESS RIGHT TO ASSERT THESE COLLATERAL ATTACKS.

It is not the case that *only* parties and their privies can be bound by an earlier judgment. *But see* Wilks Br. at 19-20; U.S. Br. at 12-13. As respondents' own authority notes, "several exceptions exist". *Sea-Land Servs.*, 414 U.S. at 593. Due process requires only that a person be given both notice and the opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). The Wilks Respondents had both.

A. The Wilks Respondents Had Adequate Notice.

For the very first time in this litigation, the Wilks Respondents challenge the adequacy of their notice. *See* Wilks Br. at 26-30. Significantly, the United States does not join their argument.

1. The Wilks Respondents have no due process claim because they do not dispute that they knew, or even that they should have known, that the prior litigation and the consent decrees could affect their interests.

Although the Wilks Respondents assert that they "never *received* adequate formal or actual notice" (Wilks Br. at 26 (emphasis added)), they do not say that they *had* no actual knowledge of the decrees or the race-conscious relief. Indeed, Mr. Gray testified in 1981 that the BFA—of which all of the

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21. Despite that instruction, we are informed that the union in *Local 93* has commenced a collateral attack on the consent decree rather than raising those claims on remand in the consent decree litigation.

firefighter plaintiffs are members (R11-23-43; R13-218-3)—kept apprised of the prior litigation beginning in 1974, and that "[n]either I nor the Firefighters were aware of the negotiations which were taking place between plaintiffs and defendants in these cases *until the formal notice of the consent decrees was given*". J.A. 773 (emphasis added). The Eleventh Circuit's finding that "BFA members . . . knew at an early stage in the proceedings that their rights could be adversely affected" is well supported. *See* J.A. 154.

The City's employees could hardly not have known. Banner headlines proclaimed "U.S. suit alleges hiring bias by Jeffco, 12 municipalities" when the United States commenced the *Jefferson County* action, and the litigation was widely reported thereafter, including the fact that race-conscious relief was ordered after the 1976 trial. [22] It is thus not surprising that Mr. Fitzpatrick appeared at the fairness hearing representing the City's firefighters. *See* J.A. 699-702.

Respondents' actual notice satisfies due process. The Wilks Respondents argue that notice should have been mailed to each of them, citing *Mullane* and *Tulsa Professional Collection Servs. v. Pope*, 108 S. Ct. 1340 (1988). *See* Wilks Br. at 27-29. Neither case, however, decided that actual notice does not satisfy due process. When the Court confronted a case with actual notice, it said that the "case before us is therefore *quite different* from cases where there was no actual notice, such as *Schroeder v. City of New York*, 371 U.S. 208; *Walker v. Hutchinson City*, 352 U.S. 112; and *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306". *National Equip. Rental Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964) (emphasis added). The

22. *Birmingham News*, May 27, 1975, at 1, col. 1. *See also*, *id.*, Jan. 4, 1974, at 1, col. 3 (commencement of *Ensley Branch* action); *id.*, Jan. 7, 1974, at 6, col. 1 (commencement of *Martin* action); *id.*, Dec. 20, 1976, at 14, col. 1 ("Discrimination case starts today"); *id.*, Dec. 21, 1976, at 43, col. 1 ("Major discrimination trial starts with focus on tests"); *id.*, Dec. 22, 1976, at 29, col. 1 ("Suits say 12 Jeffco cities discriminating"); *id.*, Dec. 23, 1976, at 4, col. 1 ("Test validity argued in bias trial of cities"); *id.*, Jan. 10, 1977, at 1, col. 4 ("*Judge orders 1-3 black ratio for police*" (emphasis added)); *Birmingham Post-Herald*, May 9, 1980, at A1, col. 7 ("Police, fireman tests bias ruling upheld"); *id.*, Dec. 16, 1980, at C1, col. 6 ("High court rules city tests biased").

Court noted that because there was actual knowledge, "no due process claim has been made". *Id.* at 315. *See also Lehner v. United States*, 685 F.2d 1187, 1191 (9th Cir. 1982) (plaintiff's "constitutional argument thus boils down to due process requiring the meaningless formality of written (rather than oral) notice. . . .We refuse to elevate form over substance"), *cert. denied*, 460 U.S. 1039 (1983). [23]

2. In any event, the notice to nonminority employees was constitutionally adequate under these circumstances.

The Wilks Respondents argue that the notice of the fairness hearing was inadequate. *See* Wilks Br. at 26-30. It is agreed that notices were not mailed to them, [24] but under the circumstances here (described in the previous section), the notice by publication was perfectly sufficient. [25]

23. The record may not be complete on how much notice there was to the Wilks Respondents because that issue was never raised below. There is additional evidence not in the record that Mr. Gray "presented copies of the decree" to members of the BFA (Deposition of Billy Gray, Sept. 17, 1984 at 110-15) and that the BFA took steps to ensure that firefighters knew how the decrees would affect them.

However, the burden was on *respondents*, as plaintiffs asserting a violation of their due process rights, to establish that the notice was inadequate and the decrees invalid as to them. *See National R.R. Passenger Corp. v. Atchison, T. & S. F. Ry.*, 470 U.S. 451, 477 (1985); *Railroad Comm'n v. Pacific Gas & Elec. Co.*, 302 U.S. 388, 401 (1938). *See also Johnson*, 107 S. Ct. at 1449 (burden of proof is on the plaintiff challenging an affirmative action plan). They made no effort to meet that burden.

24. The Wilks Respondents assert, as though it were racially motivated, that notices were mailed to "minority employees and to black class members". *See* Wilks Br. at 4, 29. That is misleading. Notices were mailed only to members of the certified classes, which did not include all minority employees. *See* Pet. App. 158a-61a, 230a, 248a. That notice was mailed to class members pursuant to the express requirement of Rule 23 that "individual notice [must be given] to all members who can be identified through reasonable effort". Fed. R. Civ. P. 23(c)(2). Rule 23 does not apply to the notice required for persons other than class members, such as the Wilks Respondents.

25. The district court found that the "best notice practicable under the circumstances has been given and the notice given complies with the requirements of due process". Pet. App. 248a.

The Wilks Respondents urge that notice by publication never satisfies due process, citing *Mullane* and *Tulsa*. *See* Wilks Br. at 26-27. There is no such *per se* rule. This Court has repeatedly emphasized that "due process is flexible and calls for such procedural protections as the particular situation demands" (*Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)), and the "notice required will vary with circumstances and conditions". *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956). According to a commentator upon whom respondents rely, *Tulsa* "does not hold that Oklahoma could not—if it chose—allow its courts to make a case-by-case inquiry and bar those creditors who had or should have had actual notice of the probate proceedings from any source". Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. at 129. Under the circumstances here, where the prior litigation was highly publicized and the BFA's president testified that he learned of the consent decrees from the notice (J.A. 773), notice by publication satisfies due process.

The Wilks Respondents also challenge the content of the published notice, arguing that it was "deceptively vague". Wilks Br. at 29. That is simply not true. The published notice said that the decrees contained "goals for blacks and women, each of which are designed to correct for the effects of any alleged past discrimination", and it explained how persons could obtain further information and review copies of the decrees. Pet. App. 174a. The Wilks Respondents' reliance on *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), is misplaced. *See* Wilks Br. at 28. There, the notice was inadequate because it did "not advise the customer of the availability of a procedure for protesting". 436 U.S. at 15. Here, in contrast, the published notice said:

> "[a]ny person who wishes to register an objection(s) to either of the Consent Decrees must file such objection(s) in writing with the Clerk of the court by 4:00 p.m., July 14, 1981. . . . Individual objectors may appear at that [fairness] hearing with or without the assistance of legal counsel." Pet. App. 173a (emphasis omitted).

That description is obviously adequate. Several nonminority employees—including the BFA, represented by Mr. Fitzpatrick—did precisely as the notice instructed and raised their objections. *See* J.A. 699-716, 727-71.

B. The Fairness Hearing Provided Nonminority Employees with an Adequate Opportunity To Be Heard.

The Wilks Respondents argue that the fairness hearing did not comport with due process because the objectors "could not call witnesses or offer evidence, and, most importantly, could not appeal". Wilks Br. at 30. That claim is disingenuous. At the fairness hearing, the following colloquy took place:

> "THE COURT: All right. What is the position with respect to the objections insofar as *presenting either evidence or arguments*?
>
> "MR. FITZPATRICK: *I had just planned on presenting a very short oral argument.*" J.A. 732 (emphasis added); *see also* J.A. 703.

The fact that the objectors did not introduce evidence was of their own doing. In *Local 93*, this Court held that such an opportunity to be heard satisfies due process:

> "Here, Local 93 took full advantage of its opportunity to participate in the District Court's hearings on the consent decree. It was permitted to air its objections to the reasonableness of the decree and to introduce relevant evidence; the District Court carefully considered these objections and explained why it was rejecting them. Accordingly, 'the District Court gave the union all the process that [it] was due'". 478 U.S. at 529 (*quoting Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 400 (1982)).

And the reason that the objectors could not appeal was also of their own doing—they had not timely sought party status. *See Marino*, 108 S. Ct. at 547.

III. IN ANY EVENT, THE WILKS RESPONDENTS WERE ALLOWED TO ATTACK THE CONSENT DECREES COLLATERALLY.

As demonstrated in our opening brief, the district court in these collateral actions heard the Wilks Respondents' arguments that the decrees violated Title VII, received evidence on that issue and held at the conclusion of trial that the "City Decree is lawful". Pet. App. 61a, 106a; Martin Br. at 34-41. The Wilks Respondents' entire response is that our "representation that the validity of the decrees was an issue for trial

is false". Wilks Br. at 9 n.12 (citation omitted). [26] They obviously thought otherwise below: they submitted two pretrial briefs on the validity of the decrees to the district court; they told the court of appeals that "*[a]gain, in its December 1985 Conclusions of Law, the District Court upheld the legality of the Birmingham Consent Decree*" (Eleventh Circuit Brief for Plaintiffs-Appellants-Cross-Appellees Wilks, *et al.*, Oct. 6, 1986 at 53 (emphasis added)); and they devoted 56 pages of their briefs to the court of appeals to the validity of the decrees, including a supplemental brief concerning only the applicability of this Court's decisions in *Johnson* and *Paradise*. They had their chance at the fairness hearing and they had their collateral attack, both.

CONCLUSION

The decision below should be reversed with directions to enter judgment for the defendants.

October 24, 1988

Respectfully submitted,

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26. The United States is more circumspect. Although it acknowledges that the district court said in 1985 that the decrees are lawful, it refers to that decision as "passing references". U.S. Br. at 12. In fact, it was an alternative holding on an issue that was briefed and tried. Neither respondent refers to petitioners' detailed list of evidence admitted by the district court on the issue of the decrees' validity. *See* Martin Br. at 4-6, 37-39.

*Keenan R. Keller and Christopher Armeniades, law students in the Cravath, Swaine & Moore summer program, assisted in the preparation of this brief.

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NOS. 87-1614, 87-1639 and 87-1668

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

JOHN W. MARTIN, ET AL., Petitioners
v.
ROBERT K. WILKS, ET AL., Respondents

PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL., Petitioners
v.
ROBERT K. WILKS, ET AL., Respondents

RICHARD ARRINGTON, JR., ET AL., Petitioners
v.
ROBERT K. WILKS, ET AL., Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF ALABAMA, ARKANSAS, CALIFORNIA, CONNECTICUT, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OHIO, OKLAHOMA, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, TEXAS, VERMONT, VIRGINIA, WEST VIRGINIA, WISCONSIN, WYOMING, THE DISTRICT OF COLUMBIA, AND THE VIRGIN ISLANDS, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Interest of Amici Curiae

Amici, the states and other jurisdictions identified above, submit this brief in support of Petitioners. Amici respectfully urge this Court to rule that persons with notice of litigation, and an opportunity to intervene on a timely basis before entry of a consent decree in that litigation, should not be permitted to attack the decree collaterally in a subsequent action.

The resolution of this case will have dramatic implications for the continued efficacy of consent decrees as remedial devices in Title VII litigation and, in all likelihood, in other contexts as well. If adopted by this Court, the Eleventh Circuit's minority rule permitting collateral attacks on

consent decrees will substantially undermine the utility of such decrees.

As representatives of state employers and state personnel administrators, many of whom are parties to consent decrees in employment discrimination cases, amici have a strong interest in preserving the efficacy of consent decrees, especially in light of Congress' preference for cooperation and voluntary compliance in the area of equal employment opportunity. In this same capacity, amici have a strong interest in opposing the adoption of unworkable procedural rules, such as mandatory joinder of potentially affected employees in Title VII suits.

In addition, as chief law enforcement officers, amici have an

interest in vigorous enforcement of antidiscrimination law. Consent decrees are valuable enforcement tools which, if freely subject to collateral attack, will be far less effective.

As set forth fully below, amici respectfully urge that the judgment of the court below be reversed.

STATEMENT OF THE CASE

In January 1974, Petitioners John W. Martin, et al. commenced a Title VII action against the City of Birmingham, Alabama and the Jefferson County Personnel Board, alleging discriminatory hiring and promotion practices in the Police and Fire Departments. In 1975, the United States brought a similar action. Existing city employees and their unions were well aware of the litigation from the beginning; in fact,

the Birmingham Firefighters Association monitored the case and supplied information to assist in its defense. Joint Appendix ("J.A."), 772-773.

In 1976, a trial was held on the validity of certain entry-level examinations. The district court found discrimination and ordered race-conscious relief. J.A.553-589. In 1979, a second trial was held on the validity of other employment and promotional practices. J.A. 594. Before the court rendered a decision, the parties commenced settlement negotiations. In 1981, the parties entered into two proposed consent decrees. Appendix to Petitions for Writ of Certiorari ("Pet. App."), 122a-235a.

Notice inviting "all persons who have an interest which may be affected

by the Consent Decrees" to appear at a fairness hearing was subsequently given by publication in two local newspapers and by mail to class members. Pet. App. 146a-147a; 171a-192a; 222a-223a; 248a; J.A. 695; 697-698. The Firefighters Association filed objections to the decrees and, through Raymond Fitzpatrick -- the same attorney who represents Respondents here -- argued at the fairness hearing that the decrees' race-conscious relief violated Title VII and the Fourteenth Amendment. J.A. 699-713; 732-740; 770. The court offered Mr. Fitzpatrick an opportunity to present evidence, but the offer was declined. J.A. 732. The day after the hearing, the Firefighters Association moved to intervene in the case. J.A. 774-776. In August 1981, the district

court approved the decree and denied the motion as untimely. Pet. App. 236a-249a. The Eleventh Circuit subsequently affirmed. United States v. Jefferson County, 720 F.2d 1511, 1516-19 (11th Cir 1983); J.A. 149-161.

Beginning in April 1982, the City proposed to promote certain black employees pursuant to the consent decrees. J.A. 40-41. Competing white applicants, again represented by Mr. Fitzpatrick, commenced five "reverse discrimination" cases against the City and Personnel Board attacking the validity of the consent decrees and seeking to enjoin the promotions. Pet. App. 110a-121a; J.A. 35-36; 38-39; 91-100; 130-134. Petitioners John Martin, et al., who were plaintiffs in the original Title VII litigation, promptly intervened (over

Respondents' objection) in order to defend the consent decrees, and all defendants sought to dismiss the new suits as impermissible collateral attacks on the consent decrees. J.A. 43-47; 52; 101-103; 106-108; 165-171; 175-178; 185-187.

After a five day trial in December of 1985, the district court concluded that the reverse discrimination plaintiffs could not collaterally attack the consent decrees, and that in any case the decrees were lawful, and thus that the challenged promotions were not unlawfully discriminatory. J.A. 26-29; Pet. App. 67a-68a; 106a-107a. On appeal, the Eleventh Circuit concluded that plaintiffs were not bound by the consent decrees, reasoning that only

parties to prior litigation may be bound by orders issued in that litigation. In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1498 (11th Cir. 1987); Pet. App. 12a-20a. Apparently overlooking the district court's disposition of the case on the merits, the Eleventh Circuit remanded the case for trial. This Court granted petitions for writs of certiorari on June 20, 1988.

SUMMARY OF ARGUMENT

Amici urge this Court to hold that those who have notice and an opportunity to intervene on a timely basis in proceedings culminating in a consent decree may not collaterally attack that decree in a subsequent lawsuit. This Court has twice embraced the principle that persons who bypass an opportunity

to intervene may be subject to preclusion, and the vast majority of lower courts have barred collateral attacks on consent decrees. Like other judicially-created rules of preclusion -- including other exceptions to the general rule that only parties to prior litigation may be bound -- the rule amici urge serves the compelling interests underlying the doctrines of res judicata and collateral estoppel.

The minority rule adopted by the Eleventh Circuit, by contrast, seriously undermines the interests protected by rules of preclusion. As applied to public employers, the Eleventh Circuit's rule will impede and delay resolution of divisive Title VII cases, will discourage settlement and undermine the utility of consent decrees, will

potentially force state agencies into contempt of one of two inconsistent court orders, will discourage interested persons from intervening and instead encourage tactical maneuvering and wasteful relitigation, and will force courts to second-guess orders issued by other courts in derogation of settled policies of comity. And, these kinds of problems are likely to arise in contexts other than Title VII if the Court adopts the Eleventh Circuit's rule as its own.

In addition to promoting important policies, a rule of preclusion that requires interested parties with fair notice of the proceedings to intervene satisfies due process requirements, which require notice and a meaningful opportunity to be heard, not a hearing in fact. Moreover, while amici believe

that the opportunity to intervene on a timely basis is itself sufficient to satisfy due process, in this case Respondents were in fact heard in opposition to the consent decree, through their attorney, at a full fairness hearing prior to adoption of the decree.

Finally, this Court should reject any suggestion that involuntary mass joinder of potentially affected persons, rather than self-selected intervention, is the appropriate means to ensure that a decree has binding effect. Such a rule would create enormous practical problems, impose substantial financial burdens on all concerned, spawn wasteful litigation about the question of whom to join, and erect formidable obstacles in the path of plaintiffs claiming

discrimination, by forcing them to sue not only their employers, but their colleagues, as well. These problems cannot be solved by joinder of a defendant class or of a union, which would create significant problems of their own. But these difficulties can and will be avoided if this Court adopts the rule amici urge.

ARGUMENT

I. THOSE WITH NOTICE AND AN OPPORTUNITY TO INTERVENE IN PROCEEDINGS CULMINATING IN A CONSENT DECREE SHOULD NOT BE PERMITTED TO ATTACK THAT DECREE IN A SUBSEQUENT LAWSUIT

No fewer than six of the eight courts of appeals that have considered the question have barred collateral attacks on consent decrees. See Culbreath v. Dukakis, 630 F.2d 15, 22-23 (1st Cir. 1980); Devereaux v. Geary, 765 F.2d 268, 271 (1st Cir. 1985), cert. denied 106 S.

Ct. 3337 (1986); Marino v. Ortiz, 806 F.2d 1144 (2d Cir. 1986), aff'd by an equally divided Court, 108 S. Ct. 586 (1988); Goins v. Bethlehelm Steel Corp., 657 F.2d 62 (4th Cir. 1981), cert. denied 455 U.S. 940 (1982); Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), cert. denied sub nom. Ashley v. City of Jackson, 464 U.S. 900 (1983); Striff v. Mason, 849 F.2d 240 (6th Cir. 1988); Stotts v. Memphis Fire Dep't., 679 F.2d 561, 558 (6th Cir. 1982), rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Dennison v. City of Los Angeles Dep't of Water & Power, 658 F.2d 694, 696 (9th Cir. 1981). In addition, the Third Circuit has summarily affirmed a decision holding a collateral attack on a Title VII consent decree

impermissible, O'Burn v. Shapp, 70 F.R.D. 549, 552-553 (E.D. Pa) aff'd mem. sub nom. Lutz v. Shapp, 546 F.2d 417 (3d Cir. 1976), cert. denied 430 U.S. 968 (1977), and has applied the rule in other contexts, see, e.g., National Wildlife Federation v. Gorsuch, 744 F.2d 963 (3d Cir. 1984); Society Hill Civil Ass'n v. Harris, 632 F.2d 1045, 1052 (3d Cir. 1980). By contrast, only one other court of appeals has joined the Eleventh Circuit in taking the contrary view. See Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986). As amici set forth below, a rule barring collateral attacks brought by persons who had notice and the opportunity to intervene before entry of the decree is fully warranted by principles of preclusion law, meets due

process requirements, and should be adopted by this Court.[1/]

A. Established Principles of Preclusion Fully Support A Rule Barring Collateral Attacks By Those Who Had Notice and An Opportunity to Intervene

The rule barring collateral attacks is grounded in the recognition that

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1/ There is nothing to the contrary in this Court's decision in Local 93, International Association of Fire-fighters v. City of Cleveland, 106 S. Ct. 3068 (1986). There, the Court recognized that "[a] court's approval of a consent decree between some of the parties...cannot dispose of the valid claims of non-consenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." Id. at 3079 (emphasis added). But, because Local No. 93 had "failed to raise any substantive claims" before the entry of the consent decree, the Court, in affirming the approval of the decree, expressly raised the question "[w]hether it is now too late to raise such claims...." Id. at 3080. In short, the Court carefully reserved the possibility that opponents of Title VII consent decrees may lose any claims not timely raised.

permitting separate lawsuits to challenge a consent decree "would raise the specter of inconsistent or contradictory proceedings, would promote continued uncertainty thus undermining the concept of a final judgment and would violate the policy of promoting settlement in Title VII actions." Marino v. Ortiz, 806 F.2d at 1146. The Eleventh Circuit ignored all of these factors, because it found singularly dispositive the fact that Respondents were not parties to the prior proceedings. In applying so inflexible a rule, however, the court below plainly erred.

1. The Compelling Interests Supporting Preclusion Have Led to Many Judicially-Created Exceptions to the Rule That Only Parties May Be Bound

Although "the general rule is that non-parties to the first action are not bound by a judgment or resulting determination of issues," Sealand Services, Inc. v. Gaudet, 414 U.S. 573, 593 (1974), this Court has recognized that "several exceptions exist," id. at 593 -- including many exceptions carved out by judges.

For example, persons whose interests were actually represented by a party are bound. See, e.g., Nevada v. United States, 463 U.S. 110, 139 (1983); Sea-Land Services, 414 U.S. at 593; Hansberry v. Lee, 311 U.S. 32, 42-43 (1940); Heckman v. United States, 224

U.S. 413, 445-446 (1912). Likewise, a non-party is bound by a decision where his interests are "so similar to a party's" that the party was his "virtual representative" in the previous action. United States v. Geophysical Corp., 732 F.2d 693, 697 (9th Cir. 1984); see Aerojet General Corporation v. Askew, 511 F.2d 710, 719 (5th Cir.), cert. denied 423 U.S. 908 (1975); Cotton v. Federal Land Bank of Columbia, 676 F.2d 1368 (11th Cir.), cert. denied 459 U.S. 1041 (1982); Mother's Restaurant, Inc. v. Mama's Pizza, Inc., 723 F.2d 1566, 1572 (Fed. Cir. 1983). Further, non-parties who exercise significant "control" over litigation are also subject to preclusion. See, e.g., Montana v. United States, 440 U.S. 147, 154-155 (1979); Drummond v. United

States, 324 U.S. 316, 318 (1945); Souffront v. Companie des Sucreries, 217 U.S. 475, 486-487 (1910). And, principles of estoppel have been applied to bind non-parties who, by conduct, acquiescence or delay, induce others to believe that they will be bound by the outcome of litigation. See, e.g., Christiansen v. Farmers Ins. Exchange, 540 F.2d 472 (5th Cir. 1972); Awtry v. United States, 684 F.2d 896, 898-899 (Ct. Claims 1982); Restatement (Second) of Judgments, § 62 (1982); cf. Ohio v. Kentucky, 410 U.S. 641, 651 (1973) (acquiescence in location of border).

Indeed, this Court has itself twice embraced the principle that is central to this case -- namely, that non-parties may be bound by the results of a lawsuit if they had notice and failed to

intervene to assert their own interests. See Penn-Central and N&W Inclusion Cases, 389 U.S. 486, 505-506 (1968); Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). In Penn Central, the Court held that a non-party to proceedings in New York was precluded from litigating in parallel Pennsylvania proceedings issues resolved in New York, because the non-party had and declined "an adequate opportunity to join in" the New York action. 389 U.S. at 505. That same year, the Court suggested in Provident Tradesman's Bank that preclusion might apply to those who "purposely bypassed an adequate opportunity to intervene." 390 U.S. at 114. The principle recognized in these cases has been applied regularly in the lower federal

courts. See, e.g., Safir v. Dole, 718 F.2d 475, 482-83 (D.C. Cir. 1983) (Scalia, J.), cert. denied, 467 U.S. 1206 (1984); Bergh v. State of Washington, 535 F.2d 505, 507 (9th Cir. 1976) (Kennedy, J.); Grann v. City of Madison, 738 F.2d 786, 794-96 (7th Cir.); cert. den. 469 U.S. 918 (1984); Adams v. Bell, 711 F.2d 161, 168-170 (D.C. Cir. 1983) (en banc), cert. denied 465 U.S. 1021 (1984); National Wildlife Federation v. Gorsuch, 744 F.2d at 967. As set forth below, amici urge the Court to apply this principle here.

2. This Court Should Apply Penn Central and Provident Tradesman's Bank to Bar Collateral Attacks on Consent Decrees

A rule based on Penn Central and Provident Tradesman's Bank that bars

collateral attacks brought by those who had the opportunity to intervene on a timely basis, like the rules of preclusion applied to non-parties in the various circumstances set forth above, promotes the compelling interests that generally underlie the doctrines of res judicata and collateral estoppel -- "protect[ing] adversaries from the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. United States, 440 U.S. at 153-154 (footnote omitted); see also Nevada v. United States, 463 U.S. at 129. The rule adopted by the Eleventh Circuit, by contrast, radically undermines the interests protected by

rules of preclusion, and should be rejected by this Court.

a. Collateral Attacks Undermine Finality

First, the related interests of finality and judicial economy weigh heavily. In an era of overcrowded court dockets, it is difficult to justify permitting those with notice of a lawsuit that might affect their rights to abstain deliberately from participation as party intervenors. Where such parties sit on the sidelines or, as here, wait until the eleventh hour to seek intervention and then, if unsuccessful, launch a later collateral suit, a second court is asked to examine the very same matters that were, or could have been, decided in the first action. Federal courts can ill-afford to allocate

precious resources to indulge such sandbagging and "deliberate tactical jockeying." 18 Wright, Miller & Cooper, Federal Practice and Procedure, § 4457, at 495 (1981).

Moreover, permitting interested persons to bypass intervention in favor of a second round of protracted litigation will only delay final resolution of the dispute. Such delay is especially harmful in the context of public employment. For if the employer is unable to fill positions in the face of lengthy, continuing litigation, vitally important public safety needs may well go unmet. If, on the other hand, the employer proceeds to to fill vacant positions in accordance with the consent decree, even in the face of a second lawsuit challenging the practices authorized

by the decree, a different set of difficulties -- no less troubling -- will arise. If candidates are appointed to positions pursuant to the consent decree during the second litigation, and such appointments are later invalidated, the employer and employees might face demands that people be removed from jobs. Such a circumstance would, in turn, raise difficult questions in many civil service systems, where important rights relating to seniority pensions, other benefits, and eligibility for promotion, may accrue by virtue of an employee's holding a position. At the very least, the continued cloud of uncertainty and division that will hang over the workplace is likely to exact a high cost in employee morale and productivity. Thus, for public

employers, public employees and the public at large, long delays in the final resolution of Title VII litigation carries with it disturbing consequences -- consequences that are avoided by a rule barring collateral attacks by those who could have intervened timely in the earlier litigation.

b. Collateral Attacks Undermine Settlement Incentives

Collateral attacks on consent decrees severely undermine the congressional intent that "[c]ooperation and voluntary compliance" be the "preferred means for achieving" the purposes of Title VII. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Local 93, International

Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. at 3072; 3076, n. 13 (1986). The many consent decrees that are entered into in Title VII and related cases demonstrate that Congress has achieved some success in effectuating this policy. For example, in the year ending June 30, 1987, there were 310 civil rights employment cases in the federal courts (involving both public and private employers) that were terminated by a consent decree granting some form of relief to plaintiff(s); for the year ending June 30, 1986, there were 344.[2/]

These statistics suggest that, given the frequent use of consent decrees in

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2/ Unpublished figures available from the Statistical and Reports Division of the Administrative Office of the United States Courts, Washington, D.C.

employment cases, chaos and confusion will likely result if this Court adopts the Eleventh Circuit's approach as its own. Such a departure from the majority rule barring collateral attacks may well produce an onslaught of new challenges to consent decrees that have been in place for years, on which employees and employers have long relied, and which have continuing and present effect.

Moreover, the prospective effect clearly will be to discourage settlements in Title VII cases. Public employers who know that a consent decree is subject to later collateral attack by other employees will have little incentive to settle Title VII cases, no matter how meritorious the plaintiff's claims, no matter how costly further litigation may be in taxpayer's dollars,

and no matter how fair and appropriate a proposed settlement may be. Plaintiff employees will likewise be understandably reticent to settle if the prospect of a collateral attack by those who have chosen to sit on the sidelines may be right around the corner. Thus, the congressional policy favoring voluntary compliance settlement will likely be the first casualty of a holding by this Court rejecting the majority rule barring collateral attacks.[3/]

3/ Rejecting the majority rule against collateral attacks will affect not only state employers' willingness to settle cases; it will also weaken the ability of the states to enforce their own civil rights statutes. Pursuant to 42 U.S.C. §§ 2000e-5(c), 2000e-8(b), many state and local antidiscrimination agencies have cooperative agreements with the Equal Employment Opportunity Commission, through which the state or local agency assumes jurisdiction of claims

(footnote continued)

Indeed, if this Court adopts a rule permitting collateral attacks on consent decrees, its decision will also undermine settlement in other kinds of public law litigation where consent decrees have been usefully employed, such as environmental, school desegregation and other institutional reform cases. Such a result would be unfortunate because, in appropriate circumstances, consent decrees may represent the best vehicle

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(footnote continued)

cognizable under both Title VII and the cognate state or local anti-discrimination laws. Because of frequent docket overcrowding and resource constraints, consent decrees are a vital enforcement tool for the states. A decision by this Court that subjects such decrees to easy collateral attack will seriously hamper state enforcement efforts in this important area.

for bringing about needed reforms in a way that permits public entities to participate in shaping the relief, and so to produce a better, more practicable decree -- subject, of course, to full judicial review and approval in the first instance, and continuing judicial oversight as necessary. See generally Schwarzschild, Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiate Institutional Reform, 1984 Duke L.J. 887. In addition, consent decrees save the parties and the courts the time and expense of large-scale litigation and spare each party the risk of losing a "winner-take-all" trial. Id. at 898-899. Thus, this Court should not lightly adopt a rule that will so decisively undercut

the efficacy of consent decrees. See Local 93, 106 S. Ct. at 3076 n. 13 (discussing advantages of consent decrees).

c. Collateral Attacks Undermine Compliance With Court Orders

Collateral attacks on Title VII consent decrees will create a substantial risk that employers will be subject to conflicting and inconsistent obligations. Where a consent decree authorizes race-conscious procedures in promotional selection, for example, and a subsequent order in collateral litigation bars any such procedures, the employer will be faced with diametrically opposite obligations imposed by different courts. The employer may well be forced into contempt of one or the other

court's order. As chief law enforcement officials, amici are particularly concerned that such a spectacle, arising in the context of highly publicized cases concerning public employment, will provoke or exacerbate race- and gender-based divisions by forcing public employers to "choose" which order to honor, and so will seriously undermine public faith in the rule of law and in the judicial system. That result is wisely avoided by the collateral attack rule adopted by the majority of the courts of appeals.

d. Collateral Attacks Undermine Fairness

A rule permitting collateral attacks by parties who have declined to intervene on a timely basis is, put simply, unfair. Rules of preclusion

have traditionally been shaped by principles of fairness. See e.g., Hansberry v. Lee, 311 U.S. at 42; United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966); Restatement (Second) of Judgments, § 19, com. a (1982). It is, in turn, a fundamental principle that those who sleep on their rights may properly have to suffer the consequences. See, e.g., Ohio v. Kentucky, 410 U.S. at 651; Awtry v. United States, supra, 684 F.2d at 898; International Union, Allied Industrial Workers of America v. Local Union No. 589, 693 F.2d 666, 674 (7th Cir. 1982) (per curiam); 1 J. Pomeroy Equity Jurisprudence, §§ 418-419 (4th Ed. 1918). Indeed, it is precisely this principle that led this Court in Penn Central and Provident Tradesman's Bank

to observe that those who intentionally bypass an opportunity to intervene in litigation may be subject to preclusion.

This same principle of fairness guides courts in determining, in their discretion, whether a motion to intervene is timely -- even a motion to intervene as of right. In deciding such motions, courts generally look to the time during which the would-be intervenor should have known of its interest before intervening; the prejudice to the existing parties as a result of the would-be intervenor's delay; the prejudice to the would-be intervenor if its motion is denied; and any unusual circumstances in the case. See Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977); South v. Rowe, 759 F.2d 610 (7th Cir. 1985);

see generally NAACP v. New York, 413 U.S. 345, 365-368 (1973). Here, the Eleventh Circuit applied these factors and upheld the denial of the Respondents' eleventh-hour motion to intervene in the prior proceedings, based on the untimeliness of their motion. See Jefferson County, 720 F.2d at 1516-1519. In so doing, that court expressly found that members of the Birmingham Firefighters Association "knew at an early stage in the [prior] proceedings that their rights could be adversely affected," 720 F.2d at 1516, and that "having made an apparently ill-advised decision to rely on others to advance their interests, knowing that they could be adversely affected, cannot now be heard to complain." Id. at 1517.

Despite finding that Respondents had unjustifiably slept on their rights -- dispositive for intervention purposes -- the Eleventh Circuit went on in the decision on review here to allow Respondents to achieve by collateral attack the very same purpose sought by their late attempt at intervention: to attack the validity of the decree.

Not only does the Eleventh Circuit's inconsistent approach improperly excuse persons who fail to protect their rights by intervening on a timely basis, it clearly rewards them for doing so. Had Respondents timely intervened, their claims would have been decided in this litigation, resolving the entire dispute once and for all. By instead hedging their bets, and making no timely motion to intervene, Respondents were free to

monitor the litigation closely from the outset, to offer tactical assistance, and even to be heard in opposition to the consent decree at the fairness hearing, making the same substantive legal arguments they would have made as a party. Despite all of this, according to the court below, Respondents are not bound by the resulting decree.

Thus, Respondents had it the proverbial "both ways" -- at tremendous cost to the Petitioners, to the courts and to all affected employees in Birmingham, who continue to await final resolution of a long and divisive battle that is now nearly fifteen years old. See Bolden v. Pennsylvania State Police, 578 F.2d 912, 916 (3d Cir. 1978) (denying union's late motion to

intervene where union improperly sought "the best of all possible worlds").

e. Collateral Attacks Undermine Comity

Finally, permitting collateral attacks invites the very sort of jurisdictional conflicts and duplication of litigation that the doctrine of comity is designed to avoid. See Local 93, 106 S. Ct. at 3076 n. 13 (noting advantages of channeling litigation concerning consent decrees into single forum). Collateral attacks on federal consent decrees may be assigned to a different federal judge in the same judicial district, may be filed in a different judicial district altogether or may be filed in state court. Similarly, a collateral attack on a state court decree may be filed in federal court. In any

of these circumstances, one court may be faced with the task of reviewing, reshaping or nullifying entirely the order of another court. And, the second court will be asked to adjudicate the validity of the consent decree without the long years of experience and detailed familiarity that the judge who entered the decree as an order will frequently possess. Permitting collateral attacks thus clearly invites unseemly forum-shopping, and even judge-shopping.[4/]

These results are avoided by the majority rule barring collateral

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4/ Indeed, Respondents in this case attempted mightily, but ultimately unsuccessfully, to have their collateral attacks assigned to a different district judge than the one who entered the consent decree. J.A. 147-148; 196-201; 209-217.

attacks, for through the operation of that rule, "restraint in the name of comity keeps to a minimum the conflicts between courts administering the same law, conserves judicial time and expense, and has a salutory effect upon the prompt and efficient administration of justice." Bergh v. State of Washington, 535 F.2d at 507 (Kennedy, J.) (quoting Brittingham v. Commissioner, 451 F.2d 315, 318 (5th Cir. 1971)) (rejecting collateral attack on judgment where party had the opportunity to intervene in prior proceedings); Goins v. Bethlehem Steel, 657 F.2d at 64 (rejecting collateral attack as impermissible attempt to appeal from one district judge to another).

B. Barring Collateral Attacks By Those Who Had Notice and Failed to Intervene On a Timely Basis Does Not Violate Due Process

Amici fully recognize that the due process clause imposes limits on the extent to which non-parties to previous litigation may be bound by orders issued in such litigation, Hansberry v. Lee, 311 U.S. at 40-41, and the rule amici urge requires that persons be afforded notice and an opportunity to be heard before entry of a consent decree.

Due process demands, "in any proceeding which is to be accorded finality...notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover

Bank & Trust Co., 339 U.S. 306, 314 (1950). There is, however, no "formula" for due process. Mullane, 339 U.S. at 314. What constitutes adequate notice and opportunity to be heard varies in each case, where the individual's interests must be balanced against the need for efficiency, economy and the ends sought to be achieved by the substantive law. See Mullane, 339 U.S. at 313-314; American Land Co. v. Zeiss, 219 U.S. 47, 67 (1911). Employing this analysis, courts have upheld against due process attacks rules subjecting non-parties to preclusion in different contexts. See e.g., id. at 64-70 (proceedings relating to land); Hanover National Bank v. Moyses, 186 U.S. 181, 190-192 (1902) (bankruptcy proceedings).

Due process was more than satisfied in this case because of the Respondents' long-spurned opportunity to intervene in the prior action. The Eleventh Circuit expressly recognized that the BFA's members knew that their interests could be adversely affected, yet chose not to intervene. Indeed, Respondents' actual notice of the prior proceedings from an early point appears not to be contested in this case -- nor is it likely that it could be, as cases challenging public employment practices as discriminatory typically generate widespread media attention. See, e.g., Culbreath v. Dukakis, 630 F.2d at 18; 21. Respondents likewise had notice of the proposed consent decree and the fairness hearing, well in advance of that hearing. Despite such notice,

Respondents unjustifiably declined to move for intervention at any point until after the fairness hearing, on the eve of adoption of the decree.[5/]

In these circumstances, Respondents' notice of the lawsuit and several year-long opportunity to intervene satisfy due process, for it is the opportunity to be heard that is crucial. Boddie v. Connecticut, 401 U.S. 371, 378

5/ Amici do not advocate any bright line test for determining when a non-party has had a meaningful opportunity to intervene. Consistent with Mullane, such a determination must be made on a case-by-case basis. Fed. R. Civ. P. 24 provides an appropriate mechanism for determining timeliness in each case, and this Court has recognized that the district judge, who is closest to the facts of each case, enjoys substantial discretion in evaluating the timeliness of a motion to intervene, subject to review for abuse of discretion. See NAACP v. New York, 413 U.S. at 366-368. Here, the district judge made that determination and his denial of the motion to intervene was upheld on appeal.

(1971); see Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Indeed, this Court has recognized that "[d]ue process does not, of course, require that the defendant in every civil case actually have a hearing on the merits," and has accordingly held that "the hearing required by due process is subject to waiver." Boddie, 401 U.S. at 378-79. Respondents may fairly be said to have waived their opportunity to intervene in this case.

Although amici believe the opportunity to intervene is itself sufficient to satisfy due process, it is worth noting that in this case Respondents were also accorded a full opportunity to be heard at the fairness hearing, where their present attorney, in fact, made

the same arguments attacking the decree that he now asserts in these collateral proceedings. Thus, well more than the constitutional minimum was afforded here.

II. AN ALTERNATIVE RULE REQUIRING MANDATORY JOINDER IS WHOLLY INAPPROPRIATE

As set forth above, amici believe that persons with notice and an opportunity to intervene on a timely basis before entry of a consent decree should be bound, as a matter of preclusion law. Amici thus believe that a motion to intervene pursuant to Fed. R. Civ. P. 24 is the appropriate means for interested persons to participate in proceedings that may affect them. The suggestion was made to this Court last Term in Marino v. Ortiz, that mandatory joinder under Fed. R. Civ. P. 19 is instead the appropriate vehicle. Under

this view, if parties to a consent decree wish to assert its preclusive effect against other persons, it is the parties' responsibility to join such persons in the action. As amici demonstrate below, that suggestion is deeply flawed, and has especially grave implications for Title VII litigation.

A. Mandatory Mass Joinder of Potentially Affected Persons Will Create Serious Practical Problems That Are Avoided By Voluntary Intervention

The premise of the mandatory joinder argument is that no preclusive effect may be accorded Title VII consent decrees unless affected persons are joined as parties. Should this Court adopt such a rule, the inevitable effect will be that parties instituting Title VII litigation will believe that, in order to obtain meaningful, final and

binding relief, they must join as parties anyone who may one day claim to be affected by that relief.

The practical consequences of such a rule are staggering. The puzzling threshold question for one seeking to vindicate equal employment opportunity rights under Title VII will be just whom to sue. While the employer is the natural defendant, a mandatory joinder rule would require suing many, or even all, fellow employees as well. If the case concerns promotional practices, how is the plaintiff to know who may one day aspire to a particular promotion? If the case concerns entry level jobs, how is the plaintiff to know who may one day seek such a position? By contrast, requiring interested persons with notice of the plaintiff's suit to make a timely

motion to intervene wholly eliminates this uncertainty. Such a course appropriately leaves it to those who, with notice, believe that their interests are at stake to protect those interests.

Moreover, compelling Title VII plaintiffs to join all those who might conceivably claim to be affected parties may mean suits involving hundreds or even thousands of people, especially in cases involving a large public workforce. Compelled joinder of this magnitude will impose a crushing financial burden on a plaintiff as a condition of vindicating the rights protected under Title VII. The mere cost of duplicating and serving process on so many defendants may well itself be prohibitive.

Nor are the financial costs limited to the plaintiff. Those involuntarily joined as defendants, too, will be forced to incur costs -- the cost of retaining an attorney, and then the cost of <u>either</u> participating in discovery, motion practice and trial <u>or</u>, alternatively, litigating to be dismissed as an improper or unnecessary party defendant. Indeed, mandatory joinder of large numbers of co-employees is likely to spawn a costly, burdensome new subset of motions concerning who is and is not a properly joined co-defendant under Title VII. This is especially so because many involuntarily joined employees will have strong incentives to seek dismissal: to avoid the costs and time involved in the litigation, to avoid potential liability as a co-defendant

(such as for attorneys' fees) and, perhaps most importantly, to avoid being bound, and instead to remain free to institute a second, separate lawsuit.

Furthermore, the costs of mandatory joinder cannot be measured in dollars or judicial time alone. Rather, mandatory, mass joinder of co-defendants is likely to exact a tremendous cost in workplace morale, collegiality and productivity -- an area of great concern to states, as public employers and administrators of public personnel systems. Compelling plaintiffs to sue fellow employees en masse means compelling plaintiffs to impose the substantial burdens and costs of litigation on their fellow workers, and in effect, if not intent, to charge their colleagues with wrongdoing. The

unavoidable effect of involuntary mass joinder is to equate those alleged with perpetrating discrimination with those who may have benefited from such discrimination. Such compelled joinder can only provoke resentment, divisiveness and disruption.

A mandatory joinder rule will, in short, plainly undermine the achievement of Title VII's important remedial purposes, and ultimately chill the filing of Title VII actions. As it has in the past, this Court should decline to adopt procedural rules that are "inconsistent with the underlying purposes of the statute." Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367 (1977) (declining to apply short state statute of

limitations to Title VII); accord Oscar Mayer & Co. v. Evans, 441 U.S. 750, 763 (1979).

Nor would these serious problems evaporate if the burden involuntarily to join co-employees falls to the defendant employer, instead of the plaintiff. The specter of an employer dragging scores of its employees into litigation -- whether as co-defendants or adverse parties -- does nothing to mitigate the problems of dividing the employee population and undermining morale, nor the problem of imposing financial costs on the involuntarily joined employees. Instead, it may well only exacerbate these problems by driving a wedge between the employer and the employees whom it involuntarily brings into court -- and ultimately making far more difficult the task of reconciling all

employees to necessary changes in the workplace.

Self-selected intervention by those with notice of the proceedings who wish to participate does not create these risks. It does not impose the potentially huge financial and interpersonal costs of mass joinder on a plaintiff, nor does it visit the unwanted burden and expense of litigation on involuntarily joined individual defendants. Instead, only those employees wishing to assert their own interests will intervene. Provided that their motion to do so is asserted on a timely basis, it is likely to be, and ought to be, granted. See, e.g., Howard v. McLucas, 782 F.2d 956, 959-60 (11th Cir. 1986).

B. Neither Joinder of a Defendant Class, Nor Joinder of Unions, Will Resolve The Serious Practical Problems with Mandatory Joinder.

Many of the problems caused by a rule requiring mandatory joinder of all interested individuals might appear, at first blush, to be avoidable through the use of defendant class actions or the joinder of unions as defendants. On closer examination, however, these approaches prove to be no panacea for the problems of mandatory joinder. Indeed, either approach would likely itself generate a burdensome series of side-disputes that would delay and distract from the resolution of the central Title VII claims.

1. Defendant Class Actions Would Be Unworkable

Defendant class actions in Title VII cases would be unworkable for a number of reasons. First, it may be difficult to find a defendant class representative who is willing and able to undertake the burden and expense of the litigation. This problem is exacerbated where, as here, neither the putative class representative, nor the class members, have any incentive to be bound by the results of the litigation. To the contrary, employees opposed to Title VII relief, in order to preserve their freedom to bring later collateral attacks on the relief ultimately agreed to or awarded, will more likely purposely avoid -- indeed, resist -- party status. E.g., Bolden

v. Pennsylvania State Police, 578 F.2d at 916.

Moreover, a person named as representative of a defendant class has every incentive to provide inadequate representation, knowing that this will pave the way for later collateral attacks by class members arguing that they were inadequately represented in, and thus not bound by, the earlier litigation. These attacks, if successful, will result in relief from the consent decree that would benefit not only the attackers, but all existing employees, including the original class representatives. In terms of both resources and results, then, unwilling defendant class representatives have everything to gain and nothing to lose from providing weak representation.

Defendant class representatives designated by plaintiffs will face additional difficulties in providing adequate representation, because of the likely divergence of interests within the defendant class. Class members' interests will vary according to their seniority, rank, department, and status as a present, as opposed to future, employee. Those defendant class members with less to lose will at some point come to favor settlement, whereas those with the most to lose will favor litigation to the bitter end. It therefore appears likely that, unless proper subclasses are designated, representation will be inadequate and the consent decree will remain subject to later attack.

Yet it is defendant class members who will be in the best position to sort themselves into adequately representative subclasses. Under a mandatory joinder approach however, they will have little incentive to do so, knowing that inadequate representation will preserve their freedom to bring later attacks. It is only where interested persons with notice and an opportunity to intervene are held to be bound that those persons will have any incentive to designate adequate class representatives.

None of these serious problems is posed where interested employees themselves seek to intervene, and choose to do so as a class. In such a circumstance, they will select their own representative, they will divide into

appropriate subclasses if necessary, and their chosen representatives will be fully motivated to provide full and adequate representation.

2. Mandatory Joinder of Unions Would Also Be Unworkable

It is likewise no answer to suggest that Title VII plaintiffs may easily bind all interested parties simply by suing the union. Such suits will present their own particular problems in the Title VII context.

Most important, the adequacy-of-representation problems identified above are not alleviated simply by suing the union. The represented class will still be divided along lines of rank, seniority, and department, and it is open to question whether a union composed of

existing employees would adequately represent the interests of future non-minority applicants for employment. Additionally, there is the potential for divergence of interests between the union itself and its own members. The union may face back pay and attorney's fee liability under 42 U.S.C. §§ 2000e-5 (g), (k), and consequently the union may have a strong incentive to settle the case quickly and without any admission of involvement in past discrimination. Union members, on the other hand, may feel less directly affected by such liability and more interested in avoiding prospective relief at any cost; they thus will favor litigation over settlement.

Indeed, this Court has recently recognized that unions and similar associations:

> will not always be able to represent adequately the interests of all their injured members. Should an association be deficient in this regard, a judgment won against it might not preclude subsequent claims by the association's members without offending due process principles. And were we presented with evidence that such a problem existed . . ., we would have to consider how it might be alleviated.

International Union, United Automobile Workers v. Brock, 477 U.S. 274, 290 (1986). Because the mandatory joinder approach presents potential for inadequate representation, this Court should "consider how it might be alleviated" and adopt a mandatory intervention approach in this case. The alternative is to leave to the lower courts the burdensome task of dealing

with the spate of collateral attacks alleging inadequate representation that are likely to ensue from the adoption of a mandatory joinder approach.

CONCLUSION

A rule barring collateral attacks by those who have had and declined a fair opportunity to intervene in an action on a timely basis promotes compelling interests served by preclusion law, satisfies due process requirements and appropriately relies on self-selected intervention by interested parties. An alternative rule requiring mandatory joinder, by contrast, is impractical, burdensome for all, and inconsistent with the policies underlying Title VII.

For all of the foregoing reasons, amici respectfully urge that the

judgment of the Eleventh Circuit be reversed.

Respectfully submitted,

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IN THE

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v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICI CURIAE* OF NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., WOMEN'S LEGAL DEFENSE FUND, NATIONAL WOMEN'S LAW CENTER, AND INTERNATIONAL ASSOCIATION OF BLACK PROFESSIONAL FIREFIGHTERS IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE* OF NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., WOMEN'S LEGAL DEFENSE FUND, NATIONAL WOMEN'S LAW CENTER, AND INTERNATIONAL ASSOCIATION OF BLACK PROFESSIONAL FIREFIGHTERS IN SUPPORT OF PETITIONERS

This brief in support of petitioners is submitted with the written consent of counsel to all parties filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The NAACP Legal Defense and Educational Fund, Inc., ("LDF") is a non-profit corporation whose prin-

cipal purpose is to secure the civil and constitutional rights of black persons through litigation and education. For more than forty years, its attorneys have represented parties in thousands of civil rights cases, including many significant employment discrimination cases. *See, e.g., Bazemore v. Friday*, 478 U.S. 385 (1986); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

The issue presented here is particularly important to the LDF's litigation efforts. First, the LDF has litigated many complex class action employment cases, and, with few exceptions, has entered into consent decrees that have contained the final remedies for the plaintiff class. For example, after trial and review by the court of appeals and this Court, the LDF entered into consent decrees that resolved both the *Griggs* and *Albemarle Paper* cases. If consent decrees in fair employment cases may routinely be challenged by collateral attack as the court below permitted in this case, the LDF will be unable to rely on the use of such decrees to secure fair employment remedies.

Second, the decision below threatens severely to undercut the ability of the LDF and other civil rights groups to bring fair employment actions. The LDF litigates claims on minority employees' behalf on a *pro bono* basis, and resources available to fund that litigation are limited. Settlement of cases is therefore an essential means of maximizing the LDF's effectiveness, allowing it to provide services to more employees and other civil rights plaintiffs. If the LDF is forced to litigate every case to conclusion or to face the repeated challenges to consent decrees that the decision below promises, its effectiveness clearly will be diluted. Without the incentives to settlement that are jeopardized by the decision below, many of the important fair employment gains of the last two decades could not have been achieved.

Third, the LDF has repeatedly represented plaintiffs challenging civil rights violations in the City of Birmingham. That litigation has vindicated the right to demonstrate against racial discrimination,[1] the right to integrated transportation,[2] the right to equal educational opportunity,[3] the right to non-discriminatory zoning,[4] the right to fair employment,[5] and the right to a nondiscriminatory statute governing the personnel system.[6] Having spent four decades challenging discriminatory practices in Birmingham, it is important for the LDF to support the effective action taken by Birmingham to remedy the continuing effects of an unfortunate history of racial discrimination.

* * * *

The Women's Legal Defense Fund ("WLDF") is a non-profit, tax-exempt membership organization, founded in 1971 to provide *pro bono* legal assistance to individuals who have been discriminated against on the basis of sex. WLDF devotes a major portion of its resources to combatting sex discrimination in employment through *pro bono* litigation of significant employment discrimination cases, operation of an employment discrimination counseling program, public education, and advocacy before the Equal Employment Opportunity Commission and

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[1] *Shuttleworth v. City of Birmingham*, 394 U.S. 147 (1969); *Walker v. Birmingham*, 388 U.S. 307 (1967).

[2] *Bowman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960).

[3] *Armstrong v. Board of Education*, 333 F.2d 47 (5th Cir. 1964).

[4] *City of Birmingham v. Monk*, 185 F.2d 859 (5th Cir. 1950), *cert. denied*, 341 U.S. 940 (1951).

[5] *James v. Stockham Valves & Fittings, Inc.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

[6] *Woods v. Florence*, No. CV 82-PT-2272-S (N.D. Ala. Jan. 31, 1988).

other federal and local agencies that are charged with enforcement of equal opportunity laws.

WLDF has represented numerous plaintiffs in employment discrimination actions brought pursuant to Title VII of the Civil Rights Act of 1964, and thus recognizes the importance of resolving such cases without resort to extended litigation. For example, in 1987 WLDF resolved *LaPlace v. Ridgewells Caterers*, a case in which it provided *pro bono* representation to more than 500 waitresses who alleged occupational segregation and sex-based wage discrimination. As a result of the settlement obtained in that case, men and women will be assigned to jobs and paid without regard to sex, and a class of waitresses will be provided back-pay.

Consent decrees have been relied on as an effective means of resolving complex litigation in ways that benefit employers and employees. A decision by this Court increasing the vulnerability of consent decrees would undermine the enforcement of Title VII and negate the employment gains achieved by women and people of color in this country.

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The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964, as amended, and other civil rights statutes, and through the implementation of effective remedies for long-standing discrimination against women and minorities.[7]

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[7] NWLC has participated as an *amicus curiae* in Title VII cases before the Supreme Court, including *Johnson v. Transportation Agency, Santa Clara County California*, 107 S. Ct. 1442 (1987); *Hishon v. King & Spaulding*, 467 U.S. 69 (1984); *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C. 1987), *cert. granted*, 108 S. Ct. 1106 (1988).

Consent decrees have proven to be one of the most effective remedies for the eradication of discrimination against women and minorities. The issue presented in this case, the ability of third parties to attack consent decrees collaterally, is therefore of critical importance to the National Women's Law Center and other civil rights organizations who view consent decrees as an effective and indeed desired method of resolving complex cases involving violations of civil rights. NWLC is currently representing parties to several consent decrees resolving long-standing discrimination claims, and has seen firsthand the major advances in the elimination of discrimination resulting from these decrees.[8] Absent the entry of consent decrees in these cases it is certain that both sides would have expended a great deal more time and resources, thereby diluting their overall litigation and enforcement efforts in these areas. It is also certain that the rights and responsibilities of the parties would have been resolved much less expeditiously. A ruling by this Court, like that entered by the court below, allowing collateral attacks on consent decrees would diminish the efficacy of consent decrees as a method of promoting the resolution

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[8] *See Haffer v. Temple University*, No. 80-1362 (E.D. Pa. June 13, 1988) (order tentatively approving proposed settlement in class action sex-discrimination challenge of intercollegiate athletic program); *Adams v. Califano*, No. 3095-70, *WEAL v. Califano*, No. 74-1720 (D.D.C. Dec. 29, 1977) (consent decree resolving Department of Labor and Department of Education's obligations for enforcement of Title IX and Executive Order 11246), *dismissed sub nom. Adams v. Bennett*, 675 F. Supp. 668 (D.D.C. 1987), *appeal docketed, WEAL v. Bennett*, No. 88-5065 (D.C. Cir. Mar. 3, 1988); *Advocates for Women v. Marshall*, No. 76-0862, *Women Working in Construction v. Marshall*, No. 76-527 (D.D.C. Dec. 5, 1978) (consent decree requiring federal construction contractors to take specific affirmative action steps for women, including goals and timetables).

of complex cases and would discourage organizations and individuals represented by NWLC from entering into consent decrees.

The ruling below significantly impedes the ability of NWLC and other public interest groups to litigate fair employment actions. Our work is done on a *pro bono* basis. The extent to which we are able to bring cases is directly related to our ability to resolve others. Settlement of these cases through consent decrees is, therefore, essential to our efforts to assist other women in securing and enforcing their rights.

* * * *

The International Association of Black Professional Firefighters was founded in Hartford, Connecticut, in October 1970. The Association promotes interracial progress throughout fire departments in the United States by advocating the promotion and hiring of black firefighters. Many of the local chapters of the Association are actively involved in the enforcement of consent decrees aimed at full desegregation of the fire service. Accordingly, the continued viability of consent decrees for resolution of fair employment disputes is of significant concern to the Association.

STATEMENT

Amici adopt the statement of facts set forth in the brief of Petitioners Martin, *et al.* *Amici* limit their factual statement to the uncontested facts that are particularly significant to their position in this brief.

The employment practices of the City of Birmingham were the subject of contentious litigation for more than eight years prior to the filing of the first of these actions in 1982. The federal government, the NAACP, and classes of minority applicants and employees alleged discrimination in virtually every branch of city employment and demanded a reversal of the city's long and infamous

history of racial discrimination.[9] Their claims—and the two resulting trials—were the subject of prominent and continuous press coverage that made the case notorious in the community.[10]

Respondents do not dispute that they had actual knowledge of the litigation from its early stages in 1974. Indeed, the Eleventh Circuit determined that respondents "knew at an early stage in the proceedings that their rights could be adversely affected" if petitioners prevailed. *United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983). Members of the Birmingham Firefighters Association ("BFA") continually monitored the case and consulted with the Personnel Board regarding the litigation's impact on the interests of nonminority employees. Joint Appendix ("J.A.") 772-73. Those contacts with parties to the case were maintained throughout the course of the litigation. *Id.* at 773.

In May 1981, the parties negotiated consent decrees designed to resolve all outstanding claims of discrimination on the basis of race or sex. As an element of those decrees, the parties established a process for providing notice to all interested persons. Appendix to the Petitions

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[9] That history is recounted in the brief of petitioners Martin, *et al.* *Amici* submit that the facts of this case are no less extreme than those that this Court found to warrant extraordinary court-ordered relief in *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986), and *United States v. Paradise*, 480 U.S. 149 (1987).

[10] *See, e.g.*, Birmingham News, Jan. 4, 1974, at 1; *id.* May 27, 1975, at 1; *id.* Dec. 20, 1976, at 14; *id.* Dec. 21, 1976, at 43; *id.* Jan. 10, 1977, at 1; Birmingham Post-Herald, May 9, 1980, at 1. The first trial, held in 1976, involved the legality of exams given applicants for the police and fire departments. It resulted in a judgment for plaintiffs that was affirmed by the Fifth Circuit. *Ensley Branch of the NAACP v. Seibels*, 14 Fair Empl. Prac. Cases (BNA) 670 (N.D. Ala. 1977), *aff'd*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980). The 1979 trial, involving other hiring and promotional practices, did not produce a judgment prior to entry of the consent decrees.

for Certiorari ("Pet. App.") 146a-47a; J.A. 697. That process provided nearly two months' notice of the scheduled fairness hearing and advised interested parties of their right to object to the decrees. Pet. App. 146a-47a. Notices were published in two local newspapers and also served by mail on class members. *Id.* at 146a.

Following this notice process, the district court held a fairness hearing at which it received oral and written testimony and considered the objections of a number of persons to the terms or legality of the consent decrees. J.A. 727. Several non-minority employees, as well as representatives of the BFA, appeared at the fairness hearing to present their objections. Pet. App. 238a-39a. They asserted that the court could not approve a settlement providing "for affirmative relief for blacks and females which [would] adversely discriminate against whites and males without a judicial finding of actual discrimination." J.A. 704.[11]

The district court gave all objectors a full opportunity to present their claims and to submit relevant evidence. *Id.* at 727-28, 770. It then considered and rejected those objections in a careful and thorough opinion. Pet. App. 236a.

A scant eight months later respondents filed the first of these reverse discrimination actions in reaction to the very first fire department promotion made pursuant to the consent decree. The complaint in that case, *Bennett v. Arrington*, alleged that the city and the personnel board, acting pursuant to the consent decrees, were impermissibly certifying candidates and making promotions on the basis of race. *Id.* at 113a. It alleged that

[11] According to the objectors, such discrimination would constitute a violation of Title VII, 42 U.S.C. § 2000e-2(j). J.A. 705, 711-12. The objectors further argued that the provisions of the decrees specifying goals based on race and sex "constitute state actions which deny equal protection of law," and that for that reason the court should withhold its approval. J.A. 780.

race- or sex-conscious decisions were illegal and the consent decree was "void on its face." *Id.* at 113a-115a.[12] Respondents subsequently filed two additional complaints, both challenging actions taken by the city in compliance with the consent decree. J.A. 93, 130. Those complaints essentially constituted a restatement of objections considered at the fairness hearing, and the district court held that respondents were precluded from challenging the validity of the consent decree. Pet. App. 106a.[13]

The United States Court of Appeals for the Eleventh Circuit reversed in a sharp departure from the position uniformly adopted by other courts of appeals.[14] The court below authorized collateral attacks on the consent decrees, adopting a broad rule that is completely unjustified by the facts of this case. Indeed, the sweeping effect of the Eleventh Circuit's holding is underscored because respondents had actual notice of the pendency of the pro-

[12] The *Bennett* plaintiffs further alleged that the race- and sex-conscious provisions of the decree conflicted with various state and local authorities, including Title VII and 42 U.S.C. § 1981, as well as the fifth and fourteenth amendments. Pet. App. 113a.

[13] While declining to permit respondents to relitigate the validity of the consent decree, Judge Pointer nevertheless expressly reaffirmed his earlier ruling that the decree "is a proper remedial device, designed to overcome the effects of prior, illegal discrimination by the City of Birmingham." Pet. App. at 106a. Having thus addressed the issue of the decree's validity, the court then ruled on the merits of respondents' reverse discrimination claims, rejecting them for failure to prove discriminatory intent. *Id.* at 107a. As petitioners Martin, *et al.*, demonstrate in their brief, that decision fully and correctly disposed of the merits of respondents' claims.

[14] *See, e.g., Striff v. Mason*, 849 F.2d 240 (6th Cir. 1988); *Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986), *aff'd*, 108 S. Ct. 586 (1988); *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied sub nom. Ashley v. City of Jackson*, 464 U.S. 900 (1983); *Dennison v. Los Angeles Department of Water & Power*, 658 F.2d 694 (9th Cir. 1981); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *see also Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980).

ceeding, had opportunities to participate in it, and had their views represented at the fairness hearing by individuals pressing legal contentions virtually identical to those raised in respondents' subsequent suits.[15]

ARGUMENT

Since the enactment of Title VII in 1964, consent decrees have played a central role in the resolution of fair employment disputes. To the benefit of both litigants and the federal courts, consent decrees have provided a vehicle for terminating disputes without extended litigation, enabling the parties to develop productive working relationships under cooperatively designed guidelines.

The decision below authorizes collateral attacks on consent decrees by persons who knew of the proceedings, who had a timely opportunity to intervene, whose interests were protected by a fairness hearing, and whose position was considered by the decree court. If collateral attacks were permitted in such circumstances, consent decrees would no longer be the end to Title VII litigation, but the beginning of a protracted process in which the parties could be compelled to litigate every employment action taken under the decree. That result would nullify the multiple benefits of consent decrees and thrust onerous burdens upon the courts because parties would reject decrees as an alternative to continued litigation.

The adverse impact of the Eleventh Circuit's rule would not be limited to the *Weber*-type relief approved in

[15] In addition to the opportunity to present their views at the fairness hearing, respondents undoubtedly could have sought timely intervention as parties. Instead, they waited until after the fairness hearing to make such a request. J.A. 774. The Eleventh Circuit affirmed Judge Pointer's rejection of this eleventh-hour request as untimely. *Jefferson County*, 720 F.2d at 1516.

this case.[16] It would extend to cases involving *Franks*-type relief providing constructive seniority[17] and to more comprehensive modification of an entire seniority system under the standards set forth in *Teamsters*,[18] both of which would necessarily affect non-party employees. Under the Eleventh Circuit's rationale, non-minority employees who judged themselves to be adversely affected by any of these established Title VII remedies could bring collateral actions challenging the decree.

The facts of this case neither justify nor compel these adverse results. Rule 24 of the Federal Rules of Civil Procedure provides a fair and adequate means for non-parties to protect their interests in ongoing litigation without compromising the interests of the parties or unduly burdening the court. When non-parties know of the ongoing litigation and of the potential adverse effect of a proposed consent decree, it is reasonable to assign them the burden of intervening or appearing at the fairness hearing and presenting all their challenges to the decree. Both fundamental principles of finality and important policies of fair employment litigation require that in these circumstances collateral attacks on the consent decree be barred.

I. THE DECISION BELOW WILL FRUSTRATE THE GOALS OF TITLE VII AND IMPAIR EFFICIENT OPERATION OF THE JUDICIAL SYSTEM

This Court has consistently emphasized that voluntary settlement of employment discrimination claims is a primary objective of Title VII. *Local 93, Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3076 (1986); *W.R.*

[16] *See United Steelworkers v. Weber*, 443 U.S. 193 (1979).

[17] *See Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

[18] *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

Grace & Co. v. Local 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America, 461 U.S. 757, 770-71 (1983); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Congress strongly encouraged employers "to self-examine and self-evaluate their employment practices" and voluntarily to cease practices that perpetuate discrimination. *International Brotherhood of Teamsters*, 431 U.S. at 364 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

Consent decrees are an important vehicle for achieving these statutory goals. Today, an employment discrimination action brought against a state or local government or a large private employer is far more likely to be resolved by consent decree than litigated to judgment.[19] Because of the high volume of Title VII litigation,[20] a negotiated resolution serves the interests of the courts and the public, as well as the parties. Consent decrees remove complex, multiple party cases from the courts' trial dockets, freeing judicial resources that would otherwise be consumed by difficult procedural and legal issues.[21]

The incentives to settlement of large-scale Title VII actions are considerable. Parties are relieved of the high costs, risks, and unavoidable delays of litigating such cases to conclusion. They can cooperate in restructuring

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[19] *See* Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L. Rev. 887, 894 (*"Title VII Consent Decrees"*).

[20] In 1987, for example, the number of private plaintiff fair employment cases pending in the federal courts exceeded 10,000 cases. 1987 *Annual Report of the Director of the Administrative Office of the United States Courts* at 116.

[21] *See, e.g., United States v. Allegheny-Ludlum Industries*, 517 F.2d 826, 851 n.28 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

their employment relationship by choosing detailed, feasible solutions that are closely tailored to their specific businesses and communities. When remedies are chosen by the parties—rather than imposed by the court on the losing party—normal working relationships can be resumed more quickly.[22]

Most important, both parties to the decree are ensured of a final disposition of their dispute, approved and enforced by the federal courts.[23] The parties obtain the court's judgment that their agreement "'represents a reasonable factual and legal determination based on the facts of record. . . . If the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed.'" *Williams v. City of New Orleans*, 694 F.2d 987, 991 (5th Cir. 1982) (emphasis deleted) (quoting *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc)).[24] Indeed, recent decisions of this Court require a judicial

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[22] Consent decrees thus allow the court to enter remedies that correct past discrimination and then restore to the parties the freedom to restructure their relationship under the terms of the decree. *See Spangler v. Pasadena City Board of Education*, 611 F.2d 1239, 1242 (9th Cir. 1979) (Kennedy, J., concurring).

[23] *See, e.g., United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc) (district court's task before approving Title VII consent decree is to determine that the decree is not unlawful, unconstitutional, contrary to public policy, or unreasonable); *United States v. City of Philadelphia*, 499 F. Supp. 1196, 1199 (E.D. Pa. 1980) (same); *Alexander v. Bahou*, 86 F.R.D. 194, 198 (N.D.N.Y. 1980) (before approving Title VII consent decree, district court must be assured that its terms are not unlawful, unreasonable, or inequitable). *Cf. Kelly v. Kosuga*, 358 U.S. 516, 520 (1959) (court will not enforce a contract that violates the law).

[24] For example, in the decision on review in *Williams*, the district judge had declined to approve the consent decree because of its potential impact on non-parties. *Williams v. City of New Orleans*, 543 F. Supp. 662 (E.D. La.), *rev'd*, 694 F.2d 987 (5th Cir. 1982).

determination of the impact of affirmative action relief on third parties before such remedies may be approved.[25]

As the present case demonstrates, consent decree procedures have evolved to provide substantial protection for the interests of affected third parties. A fairness hearing scheduled after reasonable notice to interested persons provides a convenient and inexpensive forum for those potentially affected by a decree. Such proceedings assure that the decree may be considered, not just in the abstract, but in terms of its actual operation.

Finally, consent decrees commonly provide for retention of jurisdiction by the decree court to enforce, interpret, and monitor compliance with the decree. Judicial efficiency is served because a forum familiar with the decree and its factual background is available for resolution of future disputes. This feature also serves the interests of parties by minimizing any possibility of inconsistent interpretations.

A. The Decision Below Undermines Incentives to Settle Title VII Litigation

The decision below will inevitably frustrate incentives to settlement, resulting in a much larger volume of litigation. Moreover, because this case presents an extreme example of litigants who deliberately declined an opportunity to litigate in order to pursue an attack on the decree in another proceeding, the endorsement of their t ic by the court below necessarily endorses *all* collatera attacks on consent decrees.

Under the decision below, the decree can be subjected to seriatim attacks challenging its terms and legality. As a result, a consent decree becomes the *beginning* of litigation, rather than the end. If the rule adopted below

[25] *See Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1445 (1987); *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

were allowed to stand, approval of a consent decree would initiate a protracted process that would involve the federal courts in perpetual scrutiny of the employment practices of local governments and private employers.

The broad rule adopted below deprives parties of much of the benefit of resolving their disputes through consent decrees, and it consequently creates a strong disincentive to their use. The employer's motivation to negotiate a settlement would be substantially reduced because implementation of the consent decree could continually force the employer back into court to defend the decree.[26] Without some assurance of finality, the employer's only alternative might be to continue the litigation.

Plaintiffs are equally unlikely to consider a consent decree an attractive alternative under the rule adopted by the court below. For many plaintiffs who negotiate consent decrees, a share of prospective opportunities for employment and promotion is a critical element of the overall bargain. Other claims, for back pay or specific relief, may have been adjusted in negotiations in light of the prospective relief. The prospect of collateral attacks on the decree, however, would make it impossible for plaintiffs to be confident of retaining the benefits of the bargain, even after the decree court's approval. If plaintiffs' hard-earned rights to employment or promotion stand to be undone when challenged by fellow employees, they will be much less willing to compromise any claims in a settlement.

B. The Decision Below Would Produce Repetitive, Duplicative Litigation

In addition to raising virtually insurmountable obstacles to settlement of Title VII cases, the decision below implicates broader issues of comity and judicial efficiency.

[26] The employer might also be compelled to litigate its liability under Title VII—the specific judgment it sought to avoid in settling the case.

The Eleventh Circuit's rule permitting collateral attacks on consent decrees could result in the imposition of a tremendous burden of unnecessary, duplicative litigation.[27] Under the decision below, any employee who declined to participate in the consent decree litigation but claims an adverse effect due to the operation of the decree could bring a separate lawsuit against the employer.[28] Actions by even a small number of the employees affected by the operation of existing consent decrees would not only unduly burden the parties, but would severely tax judicial resources.

Moreover, nothing in the Eleventh Circuit's decision would limit this proliferation of litigation to the original decree court. Instead, non-parties could simply sit back and observe the principal litigation and, if it appeared that the judge were inclined to approve the decree, choose to refrain from participating directly in the action.[29] By

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[27] These procedural, jurisdictional, and practical problems may explain why this Court has never required Rule 19 joinder of affected third parties. Accordingly, the lower courts have consistently proceeded on the assumption that non-minority employees are not indispensable parties to Title VII actions. *See, e.g., Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 424 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); *English v. Seaboard Coast Line Railroad*, 465 F.2d 43, 46 (5th Cir. 1972) (it is clear that Rule 19(a) does not require joinder of white employees in every case in which their interests may be adversely affected).

[28] The litigation history of the instant cases demonstrates that this scenario is not unrealistically alarmist. Following entry of the consent decrees, virtually every attempt by the City of Birmingham to effect promotions pursuant to the decrees has prompted the filing of discrimination charges with the EEOC. The fact that five separate reverse discrimination lawsuits involving 41 plaintiffs challenging promotions made under the consent decrees have been brought to date is compelling evidence that a rule permitting collateral attacks engenders costly, repetitive litigation.

[29] An inevitable consequence of this option is that the efficiency of the consent decree process itself would be undermined. With such a strong disincentive for interested parties to intervene, courts and

this strategy, non-parties could knowingly avoid having their interests affected in the principal litigation in an attempt to secure a more sympathetic forum.

The availability of a different forum or judge also compounds the possibility that the separate actions would result in judgments that conflict with a preexisting consent decree. Conflicting judgments could place employers in the untenable position of being subject to contempt of court citation for complying with either (or neither) judgment.[30] In this context conflicting judgments also implicate well-established notions of comity because they arise when one district court is asked to review another court's approval of a consent decree.[31]

Respondents' conduct here exemplifies a form of claim splitting that plainly could engender conflicting judgments and impair judicial efficiency. They allowed the union to stand as their surrogate at the fairness hearing but de-

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the parties will be handicapped in fashioning the decree in the first instance for lack of input from all those whose interests may be affected.

[30] The problem of conflicting orders is dramatically illustrated by the record in this case. *See* J.A. 208. The potential for imposition of conflicting obligations is frequently recognized as a possible result of permitting collateral attacks on consent decrees. *See, e.g., Thaggard*, 687 F.2d at 68; *Stotts v. Memphis Fire Department*, 679 F.2d 541, 559 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Dennison*, 658 F.2d at 695; *O'Burn v. Shapp*, 70 F.R.D. 549, 552 (E.D. Pa.), *aff'd mem.*, 546 F.2d 417 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977); *see also United Steelworkers v. Weber*, 443 U.S. 193, 209-10 (1979) (Blackmun, J., concurring).

[31] *See, e.g., Goins*, 657 F.2d at 64 (collateral attack on a consent decree deemed an "attempt to 'appeal from one district judge to another,'" which is barred by comity) (quoting *Ellicott Machine Corp. v. Modern Welding Co.*, 502 F.2d 178, 181 (4th Cir. 1974)); *cf. Bergh v. Washington*, 535 F.2d 505, 507 (9th Cir.), *cert. denied*, 429 U.S. 921 (1976) (comity considerations require judicial restraint where requested relief would conflict with prior judgment).

clined the opportunity formally to participate in that proceeding. When the union's objections were rejected by the decree court, respondents sought to present the very same challenge to the decrees to a different judge.[32] They vigorously opposed efforts to consolidate the reverse discrimination lawsuits in a single action before Judge Pointer. *See* J.A. 147, 196, 208. Such use of claim splitting as a vehicle for forum shopping would be inevitable if consent decrees were held subject to attack in separate proceedings.

The claim splitting endorsed by the decision below also offends basic principles of finality of judgments. While the doctrine of *res judicata* is not applicable to the present case in a technical sense,[33] it is worth noting that the doctrine

> ensures "the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals."

Nevada v. United States, 463 U.S. 110, 129 (1983) (quoting *Southern Pacific Railroad v. United States*, 168 U.S. 1, 49 (1897)). To achieve that objective, the doctrine extends both to claims actually raised and determined

[32] Disappointed employees seeking to redress perceived violations of their rights can be expected to make every effort to avoid appearing before the judge that entered the decree; that judge has already decided that the decree is fair and lawful. Respondents made just such an effort here.

[33] In order for *res judicata* to apply, the previous litigation must have been between the same parties or their privies, or the party being estopped must have had control over the prior litigation. *See* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 4451 (1981).

and to claims that the parties could have litigated. *Brown v. Felsen*, 442 U.S. 127, 131 (1979). Respondents should not be "at liberty to prosecute [a] right by piecemeal . . . presenting a part only of the available grounds and reserving others for another suit." *Grubb v. Public Utilities Commission*, 281 U.S. 470, 479 (1930).[34]

Shorn of their verbiage, respondents' complaints seek merely to relitigate Judge Pointer's determination that the consent decrees are valid.[35] Having had the opportunity to seek timely intervention and fully to present their claims to the court at the fairness hearing—and after the very same claims were actually considered by the district court—respondents should not now be permitted to wage a full scale collateral attack on the consent decrees.

II. REQUIRING INTERVENTION IS THE ONLY PRACTICAL MEANS TO ACCOMMODATE THE INTERESTS OF THIRD PARTIES WHILE PRESERVING THE VIABILITY OF THE CONSENT DECREE PROCESS

A rule barring collateral attacks by persons who make a knowing decision to forego formal participation in the original consent decree adjudication is the only practical means of accommodating both societal interests served by Title VII consent decrees and individual opportunities to be heard. Congress provided a framework for that bal-

[34] This Court has confirmed the importance of conformity to *res judicata* principles in resolving fair employment claims. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *see also Detroit Police Officers Association v. Young*, 824 F.2d 512 (6th Cir. 1987).

[35] The first two complaints filed by respondents, in the *Bennett* and *Birmingham Association of City Employees* cases, literally challenged the validity of the decree. Pet. App. 110a; J.A. 93. While the subsequent *Wilks* complaint avoided an express attack on the decree, that artful pleading does not alter the fact that the complaint's essential thrust is a full-scale attack on the decree. J.A. 130.

ancing of competing interests in Rule 24 of the Federal Rules of Civil Procedure, which allows the entrance of non-parties into actions in which their interests may be substantially "impaired or impeded" in their absence. *See* Fed. R. Civ. P. 24(a)(2). Rule 24 provides for orderly disposition of non-parties' claims in a single proceeding, authorizing interested persons with knowledge of the litigation and its potential effect on them to secure a hearing.

Compulsory joinder of all non-minority employees pursuant to Rule 19(a) of the Federal Rules of Civil Procedure is not a practical alternative to Rule 24 intervention because it creates insurmountable procedural difficulties. The first of these involves statutory requirements of Title VII. Non-minority employees may contend that they cannot properly be joined as defendants because they are not proper respondents under Title VII and thus could not be subject to an Equal Employment Opportunity Commission ("EEOC") charge.[36] Similarly, non-minority employees may not be subject to joinder as plaintiffs, since they will not, in most cases, have filed their own Title VII charges and will be unable to proceed within the scope of the charges upon which the litigation is based.[37]

In addition, requiring mandatory joinder would prove unfair to both existing parties and potentially interested third parties. It would place on the existing parties the onus of determining who might be interested in the judg-

[36] Title VII limits the defendants subject to charges to employers, labor unions, agencies, and joint apprenticeships. 42 U.S.C. § 2000e-5(b). The filing of a charge with the EEOC is a jurisdictional requirement. *See* 42 U.S.C. § 2000e-5(f)(1); *Way v. Mueller Brass*, 840 F.2d 303, 307 (5th Cir. 1988); *Romain v. Kuret*, 772 F.2d 281, 283 (6th Cir. 1985); *Eggleston v. Chicago Journeymen Plumbers*, 657 F.2d 890, 905 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982).

[37] Non-minority employees could not become members of the existing plaintiff classes because their claims would be legally and factually distinct from those typical of the classes. *See* Fed. R. Civ. P. 23(a)(2).

ment, despite the potential parties' superior knowledge of their own interests. Without full understanding of those interests, existing parties might choose to draw broad groups of conceivably interested persons into the litigation, encumbering already complex proceedings without enhancing third parties' opportunities to be heard. In the case of large employers, the costs to both parties and the courts of litigating Title VII claims could rise exponentially.

The difficulties inherent in broadly expanding Title VII actions by joining all potentially interested parties could not be avoided by attempting to name a defendant class of non-minority employees. At the outset, it is currently unclear whether Rule 23(b)(2)—the class action provision applicable in Title VII cases—even permits a defendant class. This Court granted *certiorari* in *Henson v. East Lincoln Township*, 814 F.2d 410 (7th Cir. 1987), *cert. granted*, 108 S. Ct. 691 (1988), to resolve precisely that question.[38]

Beyond this, attempted invocation of class action mechanisms would require the district courts to deal with a tangle of procedural difficulties, including (1) determination of the scope of the defendant class; (2) identification of a representative who would be "typical" of the possibly thousands of employees involved; (3) investigation of the representative's ability to represent the class fairly and adequately; and (4) selection of a competent attorney for the defendant class.[39] Moreover, certification of

[38] In *Henson*, the Seventh Circuit held that Rule 23(b)(2) did not authorize defendant class actions. 814 F.2d at 417. *Accord Thompson v. Board of Education*, 709 F.2d 1200, 1203-04 (6th Cir. 1983); *Paxman v. Campbell*, 612 F.2d 848, 854 (1980) (en banc), *cert. denied*, 449 U.S. 1129 (1981). *But see Marcera v. Chinlund*, 595 F.2d 1231, 1238 (2d Cir.), *vacated on other grounds sub nom. Lombard v. Marcera*, 442 U.S. 915 (1979).

[39] *See generally* Note, *Certification of Defendant Classes Under Rule 23(b)(2)*, 1984 Colum. L. Rev. 1371, 1384-89 (*"Certifica-*

the defendant class might be denied on standing grounds if plaintiffs could not demonstrate that their interests were adverse to those of all proposed class members.[40]

Substantial questions of fairness to third parties also arise, because the named representative—despite a potential lack of personal interest in the implementation of the decree—would be forced to retain appropriate counsel, assume responsibility for costs, and accept the obligation of properly representing the class.[41] In addition, these obligations to the class may make the representative unable or unwilling to settle, burdening the court with litigation that might otherwise be concluded through negotiation. Rather than providing a procedural panacea, addition of a defendant class to ongoing Title VII litigation would only compound its complexity.

Given the massive practical difficulties that would be created by requiring mandatory joinder under Rule 19, Rule 24 is clearly the superior procedural mechanism for

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tion"). The adequacy of the representative would be a critical issue that would determine the binding effect of any judgment on the unnamed class members. *See Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940); *see also* Wolfson, *Defendant Class Actions*, 38 Ohio St. L. J. 459, 477 (1977).

[40] *See* 7A C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure* § 1770 at 403 (1986); *Certification*, 84 Colum. L. Rev. at 1375; *see also LaMar v. H.&B. Novelty & Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973); *Mudd v. Busse*, 68 F.R.D. 522, 527 (N.D. Ind. 1975), *aff'd mem.*, 582 F.2d 1283 (7th Cir. 1978), *cert. denied*, 439 U.S. 1078 (1979); *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 690 (E.D. Pa. 1973).

[41] *See* Wolfson, *Defendant Class Actions*, 38 Ohio St. L. J. 459, 464 (1977). Faced with the high costs of defending such litigation, the involuntary class representative might well claim a violation of his due process rights, adding a further complication to the litigation. *See* Williams, *Some Defendants Have Class: Reflections on the GAP Securities Litigation*, 89 F.R.D. 287, 293 (1981); *see also Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 235 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

resolving the claims of informed third parties.[42] While both rules provide a means of involving non-parties in litigation that may affect them, Rule 24, with its voluntary component, is better able to deal with cases in which the person has notice of the action and can decide whether his interests warrant participation in the action.

Moreover, respondents here had an additional option to participate, short of formal intervention, by appearing at the fairness hearing. That hearing, held after community-wide notice of the opportunity to appear and participate, provided respondents with an effective means of raising all their challenges to the decrees' factual foundation, terms, and design, including any alleged trammeling effect arising from the decrees. As the transcript of that hearing amply demonstrates, the district court was scrupulous in providing all interested persons the opportunity to be heard. J.A. at 727. Respondents, who declined formally to participate in that proceeding, cannot establish any procedural or equitable right to an additional opportunity to assert their claims.

CONCLUSION

The rule of law adopted by the court below undermines strong statutory policies encouraging voluntary settlement of Title VII actions and ignores fundamental policies favoring finality of decrees and judgments. This Court should reject the broad rule adopted below and require employees with knowledge of ongoing Title VII litigation against their employers to take the initiative in protecting their own interests. Neither the Federal Rules

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[42] Neither the text nor the legislative history of these rules requires a preference for mandatory Rule 19 joinder over voluntary Rule 24 intervention. *See* Fed. R. Civ. P. 24 advisory committee note (1966 Amendment); *see also New York State Association for Retarded Children v. Carey*, 438 F. Supp. 440, 445 (E.D.N.Y. 1977) (the only difference between intervention under Rule 24 and joinder under Rule 19 "is which party initiates the addition of a new party to the case").

of Civil Procedure nor the Constitution grants individuals such as respondents the right to waive formal participation in ongoing proceedings and then relitigate identical issues in their chosen forum. Accordingly, where the non-parties to a consent decree have knowledge of the proceeding and a timely opportunity to intervene but choose not to do so, they should be precluded from attacking the terms or legality of the consent decree in a subsequent collateral proceeding.

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On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether persons affected by court-approved consent decrees, who were provided with actual notice and a meaningful opportunity to be heard prior to entry of the decrees, may challenge the legality of those decrees in a subsequent lawsuit.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a vital interest in the legal issues that affect the powers, responsibilities, and liabilities of state and local governments.

This case involves a collateral attack on race-conscious employment actions taken by the City of Birmingham, Alabama, pursuant to consent decrees entered in resolution of Title VII class action litigation.[1] Respondents—white employees who allege that they were injured by promotion decisions made pursuant to the decrees—had actual notice of the proposed consent decrees in the underlying Title VII lawsuits before the decrees were entered, but chose neither to intervene in those actions nor to present evidence at a fairness hearing conducted by the district court. The labor association representing most of the respondents, along with several similarly situated individual nonminority employees, did appear at the fairness hearing and unsuccessfully lodged objections to the proposed decrees on respondents' behalf. In this proceeding, respondents seek to relitigate the very objections rejected by the district court at the fairness hearing.

Should respondents' collateral attack on the consent decrees be permitted to proceed, state and local governments sued as employers under Title VII could not confidently negotiate and execute consent decrees containing race-conscious relief, even following actual notice and an opportunity to be heard to all interested parties. Every selection decision made pursuant to such a decree could subject the employer to claims from disappointed employees or applicants seeking to challenge the decree upon which the personnel action was based. Government personnel practices thus would remain in an unacceptable state of uncertainty, and scarce funds would be diverted

[1] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1982).

from other governmental needs to cover litigation costs as well as potential settlements and judgments. The inevitable effect would be to discourage public employers from entering into judicially approved settlements of Title VII litigation, thereby frustrating Congress's preference for voluntary compliance as a primary means to enforce Title VII. *See, e.g., Local No. 93, Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3072 (1986).

Permitting such collateral attacks on consent decrees also would undermine the goals served by according finality to judgments. State and local governments operating under Title VII consent decrees would be exposed to a multiplicity of actions, thereby wasting scarce governmental and judicial resources, impairing the delivery of public services, and potentially leading to inconsistent decisions and legal obligations. A rule prohibiting such attacks would instead channel all arguments for and against proposed consent decrees into a single legal forum, promoting the fair, efficient, and final adjustment of all competing interests before a consent decree is approved.

Because of the importance of the issues in this case to state and local governments, *amici* submit this brief in order to assist the Court in its resolution of the issues.[2]

STATEMENT[3]

A. *The litigation underlying the consent decrees.*

Petitioners—the City of Birmingham, Alabama ("the City"), the Personnel Board of Jefferson County, Alabama ("the Personnel Board"), and a number of minority individuals including John W. Martin ("the Martin Petitioners")—seek in this Court an order that will put

[2] The parties' letters of consent, pursuant to Rule 36 of the Rules of the Court, have been filed with the Clerk.

[3] *Amici* adopt by reference the Statements presented in the briefs of the City of Birmingham and petitioners John W. Martin, *et al.* The following summary sets forth only those matters that are, in our view, of greatest significance.

to rest nearly a decade and a half of complicated and fiercely contested litigation concerning the validity of the City's employment practices under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1982) ("Title VII").[4] This litigation commenced with the filing of two actions alleging unlawful racial discrimination in employment by the City, the Personnel Board, and others, in the United States District Court for the Northern District of Alabama in 1974.[5] The United States filed a parallel action in 1975 alleging a pattern and practice of discrimination.[6] The cases were consolidated before Judge (now Chief Judge) Sam C. Pointer, Jr.

These three actions challenged the City's long history of racial discrimination in public employment. The district court held a trial in 1976 concerning only two of the many allegedly unlawful practices—the entry level examinations for firefighters and police officers.[7] The court held that the use of those examinations violated Title VII because they had an adverse impact on blacks and were not job related under *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). J.A. 553-87. The court ordered the Personnel Board to certify to the City, as eligible to be hired, specified ratios of blacks and whites. J.A. 588-89. The former Fifth Circuit affirmed,

[4] Although the reverse discrimination cases at issue here involve most of the City's departments, the cases in the Fire and Engineering Departments were tried first and are the subject of this case. Accordingly, this statement will focus on the facts pertinent to those two departments.

[5] *John W. Martin, et al. v. City of Birmingham, et al.*, Civil Action No. CA 74-Z-17-S, and *Ensley Branch, NAACP v. George Seibels, et al.*, Civil Action No. 74-Z-12-S.

[6] *United States v. Jefferson County, et al.*, Civil Action No. CA 75-P-0666-S.

[7] City employees such as respondents were very much aware of the litigation at that time. See, *e.g.*, J.A. 772-73 (testimony of the president of the firefighters' labor association, the Birmingham Firefighters Association).

and this Court denied *certiorari*. *See Ensley Branch, NAACP v. Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 (N.D. Ala. 1977), *aff'd in pertinent part*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980).

B. *The consent decrees.*

A second trial, lasting eight trial days, was held in 1979 concerning certain other employment and promotional practices. Extensive additional evidence of discriminatory employment practices was adduced.

After the trial, but before the district court announced its decision, the parties entered into settlement negotiations. In 1981 the parties reached agreement on two proposed consent decrees—one among the plaintiffs, the United States, and the City (Pet. App. 122a-201a), and the other among the plaintiffs, the United States, and the Personnel Board (Pet. App. 202a-35a)—containing commitments to affirmative action goals and various procedures to implement those goals. The parties submitted these proposed decrees to the court for its consideration and approval.

Court-ordered notice inviting "*all persons who have an interest which may be affected by the Consent Decrees*" to submit written objections, if any, and to appear at a fairness hearing was published in two local newspapers and mailed directly to minority employees. Pet. App. 146a-47a (emphasis in original), 171a-92a, 222a-23a; J.A. 697-98.[8] Several objections were filed, claiming either that the relief was insufficient or that the relief was unlawful and excessive. The United States submitted a brief asserting that the race-conscious relief called for under the decrees satisfied and was consistent with Title VII. See J.A. 717-26.

Among the objectors were the Birmingham Firefighters Association and two of its nonminority members, Messrs. Gray and Sullivan (hereinafter collectively "the BFA ob-

[8] As discussed *infra*, respondents never have claimed that they did not have actual notice of the proposed decrees at this time.

jectors"). Each was represented by Mr. Fitzpatrick, who is also counsel for the respondents here. See J.A. 699-702; 703-13. Although respondents did not lend their names to the BFA's objections to the consent decrees, the BFA said at the time that "[i]t represents the interests of the majority of the presently-employed firefighters of the City of Birmingham" (J.A. 774), and it asked that the court consider the interests of nonminority employees even though they were not parties. See J.A. 704-05. At the fairness hearing, Mr. Fitzpatrick argued vigorously that the decrees' race-conscious relief violated both Title VII and the Fourteenth Amendment. See J.A. 731-40, R9-1255 to 67. The court offered him the opportunity to present evidence, but he declined. J.A. 732, R9-1266 to 67.

After "review[ing] with care the provisions of the proposed settlements to which objections have been raised, as well as those portions to which no objection has been raised" (Pet. App. 246a), the district court approved and entered the decrees. *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1839 (N.D. Ala. 1981), *aff'd on other grounds*, 720 F.2d 1511 (11th Cir. 1983). Pet. App. 236a-49a.

After the fairness hearing, the BFA objectors sought to intervene (J.A. 772-76), but the court denied their motion as untimely. Pet. App. 246a.[9] The court of appeals affirmed, holding that the district court had not abused its discretion by denying leave to intervene at such a late date. *United States v. Jefferson County*, 720 F.2d

[9] At no time did respondents seek to intervene, either for purposes of appeal or otherwise. At the time that the BFA objectors sought intervention, it was not clear that a consent decree could be approved over the objection of one of the parties to the litigation, a question finally resolved by this Court in *Local No. 93, Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3079 (1986). The BFA objectors apparently sought to become full parties to the litigation to continue to press before the district court the very same objections that had been rejected at the fairness hearing, and, if possible, to interpose yet another barrier (withholding their consent) to entry of the decree.

1511, 1516-19 (11th Cir. 1983). J.A. 157-60. The BFA objectors did not file a petition for *certiorari*.

C. *The reverse discrimination litigation.*

In April 1982, consistent with the consent decrees, the City began for the first time in its history to promote black employees to supervisory positions in the Fire and Engineering Departments. J.A. 41; J.A. 439-45, R1-27. Competing white candidates challenged these proposed promotions, filing a series of reverse discrimination cases.[10] Ultimately, five reverse discrimination actions were filed. There are presently forty-one plaintiffs (some by intervention) in the five pending actions.

It was not until April 2, 1984—two years after the reverse discrimination litigation began—that all of the reverse discrimination cases were consolidated. J.A. 207. The Martin petitioners, plaintiffs in the underlying litigation that resulted in the decrees, intervened as defendants, over the objection of the reverse discrimination plaintiffs.[11] J.A. 46-47; 106-08; 169-71; 186.

Defendants unsuccessfully moved to dismiss each of the reverse discrimination cases as impermissible collateral attacks on the consent decrees. J.A. 223-24. The court held a five-day trial in December 1985 concerning only the promotions of blacks in the Fire and Engineer-

[10] The first of these actions was brought to challenge proposed promotions in the Fi Department. The plaintiffs, all of whom were members of the BFA, were represented by Mr. Fitzpatrick.

[11] The decrees provide that: *"the parties* hereto agree that they *shall* individually and jointly *defend the lawfulness* of such remedial measures *in the event of challenge* by any other party to this litigation or *by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack."* Pet. App. 125a, 203a (emphasis added). Notwithstanding this commitment, the United States, which was a party to the decrees, intervened and realigned in the reverse discrimination actions as a plaintiff and challenged many of the promotions of blacks made pursuant to the decrees. J.A. 319-25.

ing Departments.[12] At the conclusion of the trial, the district court held that the reverse discrimination plaintiffs' claims were impermissible collateral attacks on the consent decrees. The court also held, in the alternative, that the remedial relief provided by the consent decrees was lawful, and that the promotions at issue constituted just such relief as was called for under the decrees. Pet. App. 61a-62a; 65a; 106a-07a; 109a. Plaintiffs timely appealed.

D. *The decision below.*

A divided panel of the Eleventh Circuit reversed the district court's dismissal of the private plaintiffs' claims. Pet. App. 3a-24a. The majority overturned the district court's ruling that the collateral attack on the consent decrees was impermissible, and remanded for trial of those claims.[13] The panel unanimously affirmed the dismissal of the claims of the United States, holding that the United States, as a party to the decrees, was estopped from challenging the City's actions in a collateral proceeding. Pet. App. 20a. Petitioners brought the case to this Court.

SUMMARY OF ARGUMENT

This case presents the question whether individuals who had actual notice of a proposed Title VII consent decree, and a meaningful opportunity to be heard prior to the decree's entry, may attack the legality of the decree in a subsequent lawsuit challenging individual personnel decisions. *Amici* submit that the important public interests in the voluntary resolution of employment discrimination claims and in the finality of judicial determinations require that such collateral attacks not be permitted.

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[12] The cases in the Police Department and the Streets and Sanitation Department were stayed pending the completion of the first trial. R12-127.

[13] Judge Anderson dissented in part, arguing that the consent decrees insulated the City from back pay liability, but were subject to collateral challenge seeking prospective injunctive relief.

Precluding relitigation of the legality of a Title VII consent decree by interested individuals who have deliberately forgone a meaningful opportunity to enter the litigation and challenge the decree prior to its approval fairly and appropriately balances the rights of all concerned. This rule provides all interested individuals with an effective forum in which to raise their arguments and resolve conclusively the decree's legality. Such finality in turn will decrease the burdens of repetitive litigation over the same issues, thereby conserving judicial and governmental resources, avoiding inconsistent legal obligations, and encouraging the voluntary resolution of Title VII disputes.

This rule comports with both the constitutional requirements of due process and the prudential standard of collateral estoppel. Individuals will be precluded from relitigating the legality of the decree only if they had both effective notice and a meaningful opportunity to be heard. Such issue preclusion is fully consistent with this Court's holdings that an interested nonparty who deliberately bypasses the opportunity to participate in a lawsuit may be bound by its results. In addition, this rule is demonstrably preferable to requiring the mandatory joinder of all interested individuals prior to entry of a consent decree.

Respondents here had actual notice of the proposed consent decrees and the opportunity to challenge their legality prior to the court's approval. Yet they neither filed objections nor attempted to intervene. Moreover, although respondents failed to participate, the court carefully considered and rejected the very objections that they now seek to interpose by collateral attack. Under these circumstances, respondents fairly may be bound by the district court's determination that the relief provided under the decrees is lawful.

ARGUMENT

I. PERSONS WHO HAVE NOTICE OF A PROPOSED CONSENT DECREE IN A TITLE VII ACTION AND AN OPPORTUNITY TO INTERVENE AND BE HEARD BEFORE ENTRY OF THE DECREE MAY NOT ATTACK THE LAWFULNESS OF THE DECREE IN A COLLATERAL PROCEEDING.

In this case, the Court must decide whether nonminority employees, with actual notice of a proposed Title VII consent decree, deliberately may forgo the opportunity to challenge the proposed consent decree in the underlying litigation, and instead may wait and file separate individual actions to relitigate the validity of the decree. Resolution of this question requires the Court to consider several competing interests. Minority employees have a strong interest in prompt and effective redress for employment opportunities lost through a long history of employment discrimination. Nonminority employees who may be affected by race-conscious relief have an undoubted interest in ensuring that such relief is narrowly tailored and does not unnecessarily trammel their expectations. These competing private concerns in turn must be evaluated in light of the public's dual interest in facilitating the voluntary eradication of employment discrimination and in achieving a prompt and final resolution of discrimination claims, so that the City's mission of public service and protection will not be impeded by uncertainty and the costs and burdens of continued litigation.

We submit that these interests are appropriately balanced by a rule forbidding persons with actual notice of a pending decree, and a meaningful opportunity to enter the litigation and challenge that decree prior to its approval, from relitigating those challenges in subsequent lawsuits. Such a rule will require all interested parties to present their views to the court that is fully familiar with the issue and has before it all of the evidence relating to the decree, allowing all points of view to be considered and resolved in one proceeding. *Cf. Local 28, Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3050-54 (1986). The rule would not preclude employees or applicants from subsequently challenging particular personnel actions on the ground that they were not consistent with the decree, or from arguing—in the consent decree litigation—that the decree should be modified in light of changed law or facts. This balancing of interests would allow all parties an effective forum in which to have their points of view considered, while avoiding the constant relitigation of identical issues sought by respondents here and approved by the court below.

A. The Related Interests In Finality Of Judgments And Remedying Employment Discrimination Are Promoted By A Rule Prohibiting Collateral Attacks On Title VII Consent Decrees Entered Pursuant To Appropriate Safeguards.

Employers, minority employees, and the public generally share a strong interest in preserving the finality of court consent decrees in cases such as this. According finality to judgments conserves judicial resources, prevents costly and vexatious multiple lawsuits, and reduces the risk of inconsistent decisions and contradictory legal obligations. *See University of Tennessee v. Elliott*, 106 S. Ct. 3220, 3226 (1986) (the value of precluding parties from relitigating issues "encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources"); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 n.6 (1982) ("invocation of res judicata and collateral estoppel 'relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication'") (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)); *Montana v. United States*, 440 U.S. 147, 153-54 (1979) (to "preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple law-

suits, conserves judicial resources and fosters reliance on judicial action").

State and local governments and the citizens whom they serve have an especially significant interest in finality because of the need for uninterrupted delivery of basic services, such as police and fire protection. That vital interest would be seriously endangered if government employment practices remained in a state of uncertainty and flux because of repeated attacks on staffing decisions. Moreover, because a consent decree is a court order, violations are punishable by contempt. *See Local No. 93, Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3074 (1986). Allowing several different courts to determine the same question—whether the consent decree is lawful *vel non*—exposes a public employer to a significant risk of inconsistent or conflicting obligations, each punishable by contempt.[14] Each and every personnel action taken pursuant to a consent decree would form the occasion for continued relitigation, complete with the possibility of injunctive relief. The government's consequent inability to make timely decisions could well cause shortages of qualified personnel that would threaten public safety.

Similarly, there is a strong public interest in resolving employment discrimination actions through vehicles such as consent decrees. The Court has "on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII." *Local No. 93*, 106 S. Ct. at 3072; *see also Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1457 (1987) ("we must be mindful of 'this Court's and Congress' consistent emphasis on "the value of voluntary efforts to further the objective of [Title VII]"'")

[14] This is a far different situation than considered by the Court in *W.R. Grace & Co. v. Local 759, Rubber Workers*, 461 U.S. 757 (1983), in which the employer deliberately had entered into separate agreements with conflicting obligations. Here, the risk of conflicts arises not from two contradictory commitments, voluntarily undertaken, but from repeated judicial interpretation of the same exact commitment undertaken only after approval by order of a court.

(quoting *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1855 (1986)); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (Title VII was enacted "to assure equality of employment opportunities . . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.").[15]

Consent decrees stem from the parties' voluntary agreement to resolve their differences. *Local No. 93*, 106 S. Ct. at 3076 ("it is the parties' agreement that serves as the source of the court's authority"). Title VII plaintiffs who agree to a consent decree do so as a compromise, relinquishing their opportunity for a broader remedy in order to ensure certain and immediate relief. See Schwarzschild, *supra* note 15, at 909; *see generally United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). Permitting nonminority employees to bring collateral suits attacking the validity of the decree each time a minority employee is hired or promoted would destroy the remedy for which Title VII plaintiffs had bargained in good faith. Employers likewise would lose the valued repose for which they had bargained away substantial elements of their managerial discretion. Finality thus is essential to safeguarding the integrity of the settlement process.[16]

[15] Commentators have recognized that voluntary compliance with Title VII is the most effective means of attaining the statute's goal of eradicating discrimination:

> A remedy designed to reform the workings of a large organization is most effective when the organization cooperates in carrying out the remedy, and the human beings who make up an institution are more apt to cooperate in carrying out a negotiated scheme than in complying with an order imposed from above by a court.

Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L.J. 887, 899.

[16] There is a clear and determinative distinction between a voluntary affirmative action plan and a consent decree for these purposes. Unlike a voluntary affirmative action plan, a consent decree may be entered only after consideration and approval by the court. Under

Permitting collateral attacks on consent decrees would burden the courts with disputes that could delay indefinitely the final resolution of important civil rights claims. There is an almost limitless supply of possible plaintiffs who might bring subsequent collateral attacks. Indeed, the very nature of race-conscious relief—which this Court has repeatedly held permissible as a remedial measure in appropriate circumstances—ensures that at least one person may wish to object to any personnel decision made pursuant to a decree.[17] Allowing collateral challenges to the legality of Title VII consent decrees thus could subject parties and the courts to endless relitigation, leading to the waste of precious judicial and governmental resources.[18]

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the rule that we propose, such a decree would have binding effect on nonparties only if preceded by effective notice and a meaningful opportunity to be heard and to intervene in the underlying litigation. Unlike affirmative action plans, which are purely private agreements whose legality has never been determined, and which therefore must be subject to judicial scrutiny in a reverse discrimination case, a consent decree surrounded by procedural safeguards should be exempt from challenges to its basic legality. We recognize that consent decrees are premised initially upon the parties' agreement. Nonetheless, a decree that is rendered following actual notice and a fairness hearing in open court certainly is more than a private contract. The court's continuing power to supervise and modify the decree, and the court's clear duty to consider and resolve all legal challenges to the decree prior to its approval, plainly distinguish a consent decree from a private agreement. We suggest that any concerns the Court may have about the level of judicial scrutiny and supervision of consent decrees be addressed not by denying those decrees the finality that they deserve, but by ensuring that all interested parties raise all objections in one proceeding, before a court that recognizes its responsibility to afford all parties a complete and sensitive hearing prior to the decree's approval.

[17] This suit illustrates that this concern is not illusory. Nearly every selection of a minority for promotion by the City has resulted in a charge of discrimination by disappointed white candidates. Five suits and forty-one plaintiffs/intervenors have resulted to date, and more can be expected in the future if the decrees are not afforded finality. The City's scarce resources are being consumed by legal defense expenditures, preventing their allocation toward resolving the countless other problems presently facing municipalities.

Such collateral attacks on a consent decree undermine the authority and finality of judgments rendered throughout our judicial system. The "'proper exercise of restraint in the name of comity keeps to a minimum the conflicts between courts administering the same law, conserves judicial time and expense, and has a salutary effect upon the prompt and efficient administration of justice.'" *Bergh v. State of Washington*, 535 F.2d 505, 507 (9th Cir.) (Kennedy, J.) (affirming denial of injunction that would prohibit federal district court judge from ordering State of Washington to promulgate regulations in favor of Native American fishermen) (quoting *Brittingham v. Commissioner*, 451 F.2d 315, 318 (5th Cir. 1971)), *cert. denied*, 429 U.S. 921 (1976). Without such restraint, "courts could never enter a judgment in a lawsuit with the assurance that the judgment was a final and conclusive determination of the underlying dispute." *O'Burn v. Shapp*, 70 F.R.D. 549, 552 (E.D. Pa.), *aff'd without opinion*, 546 F.2d 417 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977).

The rule that we propose is designed to foster these related interests, while preserving the rights of nonminorities to litigate their claims in a fair and efficient manner before the court most familiar with the case. Precluding relitigation of a decree's validity by those

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[18] *See Thaggard v. City of Jackson*, 687 F.2d 66, 69 (5th Cir. 1982) ("To permit [plaintiffs'] collateral challenge of the decrees 'would clearly violate the policy under Title VII to promote settlement.'") (quoting *Prate v. Freedman*, 430 F. Supp. 1373, 1375 (W.D.N.Y.), *aff'd without opinion*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978)), *cert. denied*, 464 U.S. 900 (1983); *Hefner v. New Orleans Pub. Serv., Inc.*, 605 F.2d 893, 898 (5th Cir. 1979) (The consent decree "was reached after careful consideration by the parties involved; they do not wish, and should not be forced, to defend the decree in lawsuits brought long after the decree was signed. Allowing suits like this would severely undercut the strong policy in favor of reaching voluntary settlements . . . ."), *cert. denied*, 445 U.S. 955 (1980).

provided with actual notice and an opportunity to intervene and be heard prior to the decree's approval appropriately balances the rights of all concerned.

B. This Rule Is Consistent With Due Process Guarantees And With Principles Of Collateral Estoppel.

1. *Due process requires only that affected individuals receive adequate notice of the proposed consent decree and an opportunity to be heard.*

Contrary to the intimations of the Eleventh Circuit, prohibiting collateral attacks on consent decrees by individuals with actual notice and an opportunity to be heard before entry of the decree is fully consistent with the due process guarantees of the Fifth and Fourteenth Amendments. Due process requires that individuals whose interests will be affected by a court's decision be provided with effective notice and a meaningful opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (the "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'") (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Due process, however, does *not* require that all interested individuals be made parties to the action. Indeed, binding individuals to judgments to which they were not parties is a long-accepted aspect of such litigation as bankruptcy, and has been held not violative of due process. *See, e.g., In re Gregory*, 705 F.2d 1118, 1122-23 (9th Cir. 1983) (affirming dismissal of action collaterally attacking bankruptcy plan; discharge of debt to nonparty creditor permissible under due process because constructive notice given); *In re GAC Corp.*, 681 F.2d 1295, 1300-01 (11th Cir. 1982) (interests of nonparty debenture holders may be extinguished through constructive notice).

2. *Prohibiting collateral attack is consistent with the prudential standard of collateral estoppel.*

The prudential standards of res judicata and collateral estoppel are judicially created doctrines designed to prevent the relitigation of issues previously decided by a court of competent jurisdiction. *See, e.g., Kremer*, 456 U.S. at 468 n.6 ("invocation of res judicata and collateral estoppel 'relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication'") (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). As such, these principles have been reshaped as legal developments have justified modifications of the rules governing issue and claim preclusion. *See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320-30, 349-50 (1971) (discussion of evolution of preclusion rules and holding modifying rule of mutuality of collateral estoppel); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-33 (1979) (permitting application of offensive nonmutual collateral estoppel at discretion of trial court).

Historically, courts permitted claim and issue preclusion only against parties to the original litigation or their privies; accordingly, even individuals with actual notice who did not intervene in a lawsuit were not bound by judgments rendered therein. *See Gratiot County State Bank v. Johnson*, 249 U.S. 246, 249-50 (1919) ("Unless he exercises the right to become a party, he remains a stranger to the litigation and, as such, unaffected by the decision of even essential subsidiary issues.").

More recent decisions by this Court, however, have recognized that strict application of these historical principles is neither mandatory nor justifiable where one intentionally has abstained from intervening in an action

in which his interests were being considered. In the *Penn-Central Merger & N & W Inclusion Cases*, 389 U.S. 486 (1968), the Borough of Moosic objected to the proposed Penn-Central railroad merger that had been approved by the Interstate Commerce Commission. Moosic filed suit in federal district court in Pennsylvania seeking an injunction. Other similar actions were filed in various district courts throughout the country. These other lawsuits, including the Pennsylvania action, were stayed pending resolution of numerous common issues by a three-judge panel in the Southern District of New York. After the Southern District approved the merger, this Court affirmed pertinent aspects of the judgment.

The *Penn-Central* Court further held that although the Borough of Moosic was not a party to the New York litigation, it was nevertheless bound by the decision approving the merger.

> [T]he Borough of Moosic had an adequate opportunity to join in the litigation in that court following the stay of proceedings in the Middle District of Pennsylvania. . . . *All parties with standing to challenge the Commission's action might have joined in the New York proceedings. In these circumstances, it necessarily follows that the decision of the New York court* which, with certain exceptions, we have affirmed, *precludes further judicial review or adjudication of the issues upon which it passes.* . . . [I]t is therefore no longer open to the parties to challenge the Commission's approval of the Penn-Central merger . . . .

389 U.S. at 505-06 (emphasis added).[19] This holding recognized implicitly the inequity in permitting an

[19] The Court went on to note that "claims for specific relief, such as particularized objections which may arise from specific proposals for consolidation or reduction of facilities or services, are unaffected by the decision in the present cases." 389 U.S. at 506. In the context of objections to affirmative action consent decrees, such "particularized objections" may be considered "as applied" challenges, questioning the propriety of the action under the decree rather than

avowedly interested person to sit on the sidelines and later bring a collateral attack on the decision.

In a similar context, this Court indicated that notice and an opportunity to intervene constitute an adequate basis upon which to bind a nonparty. In *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 107 (1968), the Court considered and rejected an assertion that a necessary party that is not joined in the suit has a "substantive right" to have the litigation dismissed. The Court stated that such a party "should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene." *Id.* at 114.

The lower courts have relied on these decisions to prohibit collateral attacks on consent decrees by persons who intentionally have refrained from exercising the opportunity to participate in the underlying lawsuit.[20] For ex-

the decree's validity. Such challenges would not be precluded under our theory, and would be heard in the consent decree litigation.

[20] It is this rationale, sometimes unstated, that underlies the numerous court of appeals decisions refusing to permit collateral attacks on Title VII consent decrees. *See Striff v. Mason*, 849 F.2d 240, 245 (6th Cir. 1988) ("It is well settled that legal actions which constitute collateral attacks on consent decrees entered in civil rights cases are not permitted."); *Marino v. Ortiz*, 806 F.2d 1144, 1146 (2d Cir. 1986) ("It is well settled that collateral attacks on consent decrees entered in Title VII actions are not permitted."), *aff'd by equally divided Court*, 108 S. Ct. 586 (1988); *Thaggard v. City of Jackson*, 687 F.2d 66, 68 (5th Cir. 1982) (collateral attacks on consent decrees "impermissible"), *cert. denied*, 464 U.S. 900 (1983); *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 558 (6th Cir. 1982) ("reverse discrimination challenges to reasonable consent decrees are impermissible collateral attacks"), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62, 64 (4th Cir. 1981) ("basic considerations of comity bar" collateral attacks on consent decrees), *cert. denied*, 455 U.S. 940 (1982); *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694, 696 (9th Cir. 1981) (reverse discrimination suit by union barred as "impermissible collateral attack"); *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980) ("Collateral attack on the decree will

ample, in *National Wildlife Fed'n v. Gorsuch*, 744 F.2d 963, 968-69 (3d Cir. 1984), the court held that the National Wildlife Federation could not collaterally attack a consent decree where it had been denied intervention, but "deliberately chose not to appeal" that decision.

> Clearly, plaintiffs were not outsiders unaware of litigation in progress that would ultimately affect their interests. In a deliberate choice of litigation strategy, they chose to stand on the sidelines, wary but not active, deeply interested, but of their own volition not participants. Although plaintiffs may not have had their day in court as litigants, they had the opportunity and for reasons of their own adopted a different approach. Plaintiffs cannot, at this stage, assert persuasively that the interest of finality should not prevail.

Id. at 971-72.[21]

The consistent theme underlying these decisions is fairness. It is unfair for persons who have actual notice of an action in which they have an interest simply to sit on the sidelines and await the outcome of the action before filing their own suit. Nonminority employees who are aware that a proposed consent decree may adversely

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be impossible because only the district court supervising implementation of the decree will have subject matter jurisdiction to modify the decree."); *cf. Black & White Children of Pontiac School System v. School District*, 464 F.2d 1030, 1031 (6th Cir. 1972) (per curiam) (affirming district court's ruling that plaintiffs may not collaterally attack school desegregation order).

[21] *See also Safir v. Dole*, 718 F.2d 475, 483 (D.C. Cir. 1983) ("It thus appears that [appellants] had full opportunity to argue the issue . . . . This is enough in law and reason to work a collateral estoppel."), *cert. denied*, 467 U.S. 1206 (1984); *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045, 1052 (3d Cir. 1980) ("an unjustified or unreasonable failure to intervene can serve to bar a later collateral attack"); *Adams v. Bell*, 711 F.2d 161, 169-70 (D.C. Cir. 1983) (en banc) (Appellants "had ample opportunity to assert their rights through the normal routes of judicial review. . . . These interests could have been fully protected by intervention in a pending lawsuit which provided an appropriate forum . . . ."), *cert. denied*, 465 U.S. 1021 (1984).

affect their interests cannot sit back, allow the settlement to be approved, and then file suit against the employer simply for complying with the decree.

C. The Application Of Appropriate Notice Procedures And Liberal Intervention Under Fed. R. Civ. P. 24 Satisfy The Requirements Of Due Process And Issue Preclusion Against Interested Persons Seeking To Challenge Collaterally The Legality Of A Title VII Consent Decree.

Collateral attacks on Title VII consent decrees should be prohibited so long as the persons to be precluded were afforded: (1) notice of the proposed consent decree and (2) a meaningful opportunity to be heard and to intervene after the notice was given. In resolving this case, we do not suggest that this Court must or should precisely delineate what notice is appropriate in order to give a consent decree binding effect. This Court has adhered consistently to a flexible concept of notice, depending upon the context in which the notice is provided. In the context of most Title VII litigation, notice of a proposed consent decree that is provided directly to present employees and also published in local newspapers of general circulation not only meets the *Mullane* standard of constitutional adequacy, but also provides a rational and adequate basis for the application of collateral estoppel. This is particularly true where the litigation has been the subject of extensive media coverage, as in the underlying litigation here.

At a minimum, the notice of a proposed consent decree must be reasonably calculated to inform all interested persons of the proceedings and of the manner in which they may appear at a hearing in order to protect their interests. Actual notification by mail or payroll notice,[22]

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[22] *Cf. Tulsa Professional Collection Servs., Inc. v. Pope*, 108 S. Ct. 1340, 1348 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983). In this case, respondents have raised no claim that they did not have actual notice.

or constructive notification by workplace posting,[23] or by newspaper, radio, or television publication is typically utilized by parties seeking to apprise interested persons of the pendency of a proposed consent decree. Depending on the circumstances, some or all of these methods may be necessary to bind nonparties to a decree.

In addition to effective notice, nonparties must be provided a meaningful opportunity to be heard prior to entry of the decree. Typically, the requirements imposed by district courts on those seeking to be heard at a fairness hearing are minimal, and therefore comport quite readily with the "opportunity to be heard" requirement of due process. Reasonable restrictions, such as requiring advance notification to the court and the parties of one's objections, do not render an opportunity to be heard meaningless. *See, e.g., Mathews,* 424 U.S. at 333 (the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'") (quoting *Armstrong v. Manzo,* 380 U.S. at 552); *Jones v. Nuclear Pharmacy, Inc.,* 741 F.2d 322, 325 (10th Cir. 1984) ("Although the right to be heard is an integral part of due process, an individual entitled to such process is not entitled to dictate to the court the precise manner in which he is to be heard.").[24]

Persons to be bound finally must be afforded a meaningful opportunity to intervene and be heard after the notice is given. Rule 24 of the Federal Rules of Civil

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[23] *Cf. Keitz v. Lever Bros. Co.,* 563 F. Supp. 230 (N.D. Ind. 1983) (workplace posting provides sufficient notice to preclude tolling of statutory limitations period for bringing age discrimination action); 29 C.F.R. § 1903.14(a)(C)(2) (1986) (OSHA regulation requiring objections within 10 days after workplace posting); 30 U.S.C. § 811 (1982) (Mine Safety and Health Act challenges tied to workplace posting).

[24] It goes without saying, of course, that it is the opportunity to be heard, rather than exercise of the opportunity, that is determinative. *See, e.g., Kremer,* 456 U.S. at 485 (the "fact that Mr. Kremer failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy").

Procedure sets forth the standards for intervention, including timeliness of the request for intervention. "The timeliness requirement is flexible and the decision is one entrusted to the district judge's sound discretion." *United States v. Yonkers Board of Education,* 801 F.2d 594, 594-95 (2d Cir. 1986); *see also NAACP v. New York,* 413 U.S. 345, 366 (1973) (Timeliness "is to be determined by the [district] court in the exercise of its sound discretion."). As this Court has indicated, the district court should not consider merely the length of time that the proceeding has been pending, but should base its determination upon all of the circumstances of the case, including possible prejudice to the would-be intervenor. *NAACP,* 413 U.S. at 365-66. A careful but liberal application of these criteria generally will permit intervention before a consent decree is approved, thereby affording potentially affected nonminority employees an adequate opportunity to challenge the legality of the decree.[25]

D. This Rule Is Demonstrably Preferable To The Alternatives.

Precluding collateral attacks by nonparties upon consent decrees entered pursuant to adequate procedural safeguards is demonstrably preferable to the only sug-

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[25] Although in some instances courts have denied motions to intervene made at the time that a consent decree is proposed (*see Culbreath v. Dukakis,* 630 F.2d 15, 22 (1st Cir. 1980); see also Schwarzschild, *supra* note 15, at 920-22 (and cases cited therein)), in most instances intervention sought prior to judicial consideration of objections to a decree will not be intolerably disruptive. A requirement that a motion to intervene be made timely upon learning that one's interests may be affected is fair to all concerned. *See Yonkers Bd. of Educ.,* 801 F.2d at 597 (any interest that the intervenor had in the action "began to gestate when it became generally known that [particular] sites [for multi-family housing] had been proposed early in the remedy proceedings"); *Corley v. Jackson Police Dep't,* 755 F.2d 1207, 1210 (5th Cir. 1985) (would-be intervenors "had control of the tactical decisions which occasioned or contributed to the inordinate delay"). The district court's decision to deny intervention to the BFA objectors is not before the Court in this case. *See United States v. Jefferson County,* 720 F.2d 1511, 1519 (11th Cir. 1983).

gested alternatives. For example, the United States, in a previous case,[26] has argued that mandatory joinder under Rule 19 of the Federal Rules of Civil Procedure should be required. Yet compulsory joinder is wholly unworkable, and would negate the effectiveness of consent decrees every bit as completely as allowing collateral attack.[27]

We submit that it is fair, constitutional, and eminently sensible to require an interested individual with notice of a proposed consent decree either to intervene and litigate its lawfulness in the underlying action, or else to waive any arguments that he may have that the decree's terms are illegal. This rule places the burden of becoming a party directly on those individuals who feel strongly enough about the issues to come forward and join in the fray. The number of parties to the action thus would correspond to those who really care about the issues. At the same time, however, the original parties will have a strong incentive to provide the most effective notice possible and to ensure that all interested individuals come forward and be heard, so that collateral challenges to the decree will be precluded.

By contrast, mandatory joinder of all "interested parties" pursuant to Fed. R. Civ. P. 19 unreasonably places the burden for bringing individuals into the court on the original parties, who have no reason to know

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[26] See Brief for the United States as *amicus curiae* in *Marino v. Ortiz*, 108 S. Ct. 586 (1988) (No. 86-1415).

[27] Requiring compulsory joinder on the grounds that nonminority employees are necessary parties for purposes of relief under a consent decree raises extraordinarily serious questions. Neither this Court's jurisprudence nor the language of the Federal Rules of Civil Procedure supports the proposition that a party may be "necessary" for relief purposes but not "necessary" for purposes of the underlying adjudication. Requiring compulsory joinder for consent decrees thus raises the specter of defendant classes, in which joinder of every party that could conceivably be affected by a case would be required at the outset of litigation. Such a procedure would make it all but impossible to conduct litigation that involves the interests of more than a few parties.

which members of this potentially enormous group are sufficiently interested to justify making them parties. Moreover, once made a party under Rule 19, each potentially interested individual will be required to file an appearance, retain counsel, and expend attorneys' fees, in a case in which his or her interest may be minimal. We submit that the choice of entry should be left to the individual, and that nothing in either the Federal Rules or this Court's jurisprudence requires mandatory joinder of all parties who conceivably might wish to litigate the validity of a consent decree.

Furthermore, the number of interested persons may be so large as to make simply irrational the attempt to join every one of them. In a nationwide Title VII class action, for example, the interested nonparties could well number in the tens of thousands, spread throughout locations all across the country, or the world. Joining each of them under Rule 19 would be exceedingly awkward, if not impossible because of jurisdiction and venue difficulties. Moreover, joinder of so many individuals would destroy the very manageability of large and complex actions that Fed. R. Civ. P. 23 was specifically designed to create. *See, e.g., Simer v. Rios*, 661 F.2d 655, 668 n.24 (7th Cir. 1981) ("the purpose of Rule 23 is to allow an efficient mechanism for disposing of multiple claims"), *cert. denied*, 456 U.S. 917 (1982).

Compulsory joinder might be appropriate if approval of a consent decree imposed substantive obligations upon nonminorities, or completely precluded them from any voice in their treatment. But as this Court made clear in *Local No. 93*, a consent decree embodying racial preferences "imposes no legal duties or obligations upon [nonminority employees or their representatives] at all; only the parties to the decree can be held in contempt of court for failure to comply with its terms." *Id.* at 3080. Moreover, many decrees will not impose significant detriments upon nonminority employees. In this case, for example, the decrees in question had the effect of (at most) postponing promotions for nonminority employees, rather

than frustrating "legitimate firmly rooted expectations." *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1455 (1987) (O'Connor, J., concurring in part and dissenting in part).

Such inchoate interests of nonminority employees—subject to alteration for any number of reasons, including reductions in force, changes in employer operations, or voluntary departure by the employee—are more than adequately protected by the rule that we propose. In addition to the opportunity to challenge the decree's legality at the outset, as discussed above, adversely affected employees may later raise "as applied" challenges, before the original trial court, claiming that the action is not permitted or mandated by the decree. *Cf. Penn-Central Merger*, 389 U.S. at 506.

Moreover, a consent decree remains subject to modification, even over the objection of a signatory, to take into account changes in law or facts. *See, e.g., Railway Employees v. Wright*, 364 U.S. 642 (1961); *United States v. Swift & Co.*, 286 U.S. 106 (1932). The court's continuing jurisdiction over the decree thus affords a powerful protection to nonminorities whose interests are affected by it in later years.

In sum, these avenues of challenge offer ample protection for the interests of nonminorities. Those interests simply do not require continued and unending relitigation of the same basic objections to the underlying legality of a consent decree, nor do they justify compulsory joinder prior to approval of a decree. A rule forbidding collateral attacks by parties with actual notice and an opportunity to intervene and be heard is the only appropriate balance of the various interests involved.

II. RESPONDENTS MAY NOT ATTACK THE LAWFULNESS OF THE DECREES BECAUSE THEY HAD ADEQUATE NOTICE AND AN OPPORTUNITY TO INTERVENE AND BE HEARD REGARDING THE FAIRNESS OF THE PROPOSED DECREES.

Respondents in this action should be precluded from bringing a collateral attack on the decrees' legality. They received adequate notice and had a meaningful opportunity to intervene and be heard regarding the fairness and lawfulness of the proposed decrees. This procedure satisfied the requirements of due process, and justifies the application of collateral estoppel to the entering court's decision approving the fairness and lawfulness of the decrees.

A. Respondents Received Adequate Notice Of The Proposed Consent Decrees And Fairness Hearing.

Each of the respondents already was employed by the City at the time that notice was distributed regarding the proposed decrees. Thus, all lived in or about the City, worked in the City, and can be expected to have appreciated the importance to their own interests of the underlying litigation seeking to open their departments to the more equitable hiring and promotion of blacks.

Notice of the proposed consent decree was published in Birmingham's most widely read general circulation newspaper and the local minority newspaper, inviting "*all persons who have an interest which may be affected by the Consent Decrees*" (Pet. App. 173a) to file any objections and appear at the fairness hearing. Pet. App. 146a-47a, 171a-92a, 222a-23a; J.A. 695 (emphasis in original). Individual notice was sent to all minority employees. J.A. 695. In addition, there was substantial media publicity regarding the proposed consent decrees and the objection/fairness hearing process.

Numerous individuals similarly situated to respondents learned of the proposed settlement. In response to the notice, the BFA and two of its nonminority members filed objections and appeared at the fairness hearing, repre-

sented by respondents' counsel. Most notably, none of the respondents has ever claimed during this long litigation that he did not have actual notice of the proposed consent decrees and the objection/fairness hearing process.[28]

B. Respondents Themselves Sought Neither To Intervene Nor To File Objections To The Proposed Consent Decrees.

Notwithstanding this notice and their knowledge of the proceedings, none of the respondents themselves ever filed objections to the proposed decrees or sought to intervene in the underlying litigation. Instead, they stood idly by, content to allow others to champion their interests,[29] and to await entry of the decrees, and then to attack collaterally the judgment if they were ever individually adversely affected by promotion of a black candidate. This is just the type of sandbagging that this Court refused to permit in the *Penn-Central Merger* case. *See* 389 U.S. at 505-06.[30] Having had notice, and having disdained the opportunity to intervene and be heard, respondents should

[28] This case does not require the Court to address the requisite extensiveness of notice because respondents here have not contested the repeated assertion that they had actual notice. Actual notice to nonparty employees will always suffice for purposes of due process. *See National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964) ("Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made. The case before us is therefore quite different from cases where there was no actual notice.").

[29] This tactic discloses yet another inadequacy of permitting collateral attacks on consent decrees. An organization such as the BFA can coordinate a multi-wave assault on the consent decree, sending some members in to challenge the decree in the underlying litigation, but holding back others for collateral attacks at a later date.

[30] *See also National Wildlife Fed'n v. Gorsuch*, 744 F.2d 963, 971-72 (3d Cir. 1984); *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 459 F. Supp. 507, 514 (S.D. Fla. 1978) ("In order to give effect to the principles of finality embodied in the doctrine of *res judicata*, courts may invoke equitable preclusion where a nonparty has been aware of the initial litigation and failed to intervene to protect its interests."), *aff'd*, 621 F.2d 1340 (5th Cir. 1980), *rev'd in part on other grounds*, 458 U.S. 670 (1982).

not now be permitted to challenge collaterally the validity of the decrees.

C. The Trial Court Received And Fully Considered Objections To The Proposed Decrees' Validity That Were Lodged On Behalf Of Respondents.

Even though respondents failed to become personally involved in the underlying litigation, their interests were adequately represented before and considered by the trial court that approved the decrees. The BFA and Messrs. Gray and Sullivan filed timely written objections to the decrees. Respondents' attorney, Mr. Fitzpatrick, represented these BFA objectors, and appeared at the fairness hearing. Seven other nonminority individuals filed a brief and appeared at the hearing. See J.A. 714.

Each of these objectors was given a full and fair opportunity to present and argue his objections and introduce evidence at the fairness hearing. See J.A. 727-30.[31] The BFA objectors voiced the very same objections upon which respondents have based their collateral challenges to the decrees.[32]

After carefully considering all of these objections, and "review[ing] with care the provisions of the proposed settlements to which objections have been raised, as well as those portions to which no objection has been raised," the court approved and entered the proposed decrees, expressly holding that the decrees "are fair, reasonable, adequate and lawful." Pet. App. 246a; see Pet. App. 236a-49a. This process provided respondents a full, fair, and meaningful opportunity to litigate the lawfulness of

[31] That Mr. Fitzpatrick elected not to introduce evidence does not taint the hearing, for it is the *opportunity to be heard* which is paramount to the conclusiveness of the judgment. *See Kremer*, 456 U.S. at 485; *see also Penn-Central Merger*, 389 U.S. at 505-06 (precluding nonparty from litigation based on "adequate opportunity to join in the litigation," despite failure to do so).

[32] Indeed, the BFA objectors asked the court to consider the interests of nonminority City employees even though they were not parties. See J.A. 704.

the decrees. Imposition of collateral estoppel is justified both because of respondents' failure to participate personally in the process to protect their own interests, and the court's careful consideration of respondents' interests through the arguments raised by their champions, the BFA objectors.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed insofar as it remanded the case for trial.

Respectfully submitted,

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Nos. 87-1614, 87-1639 and 87-1668

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN W. MARTIN, *et al.*,
Petitioners
v.
ROBERT K. WILKS, *et al.*,
Respondents

RICHARD ARRINGTON, JR., *et al.*,
Petitioners
v.
ROBERT K. WILKS, *et al.*,
Respondents

PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, *et al.*,
Petitioners
v.
ROBERT K. WILKS, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council (EEAC), with the written consents of the parties,[1] respectfully submits this brief amicus curiae in support of the petitioners, urging reversal of the decision of the court of appeals below.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers organized to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. Its governing body is a Board of Directors composed of experts in equal employment opportunity and affirmative action. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as the legal aspects of equal employment opportunity programs and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e, *et seq.*, as well as other equal employment statutes and regulations. Most are also subject to the affirmative action requirements of Executive Order 11246, 30 Fed. Reg. 12319 (1965), *as amended* by 32 Fed. Reg. 14303 (1967) and 43 Fed. Reg. 46501 (1978). In addition, a number of EEAC's members are parties to consent decrees settling charges of discrimination under Title VII and other federal and state equal employment statutes, regulations and orders.

[1] Letters of consent have been filed with the Clerk of the Court.

At issue in this case is the extent to which the federal courts will permit collateral attacks on Title VII consent decrees by persons who have not made timely efforts to intervene in the underlying Title VII litigation. The Court's resolution of this issue could seriously affect the utility of consent decrees as a means of resolving class claims of discrimination in employment, since much of the incentive to an employer to enter into such a decree would be destroyed if the employer were left vulnerable to subsequent lawsuits by persons or groups claiming that the employer's compliance with the consent decree constituted discrimination against them.

Because of its interest in this issue, EEAC was granted leave to file a brief amicus curiae in *Marino v. Ortiz*, 108 S. Ct. 586 (1988), in which the Court divided evenly on this issue. EEAC also has participated in other cases involving Title VII consent decrees, as well as many other procedural aspects of Title VII. *E.g.*, *Local Number 93 v. City of Cleveland*, 106 S.Ct. 3063 (1986) (validity of Title VII consent decree providing class-based affirmative action relief); *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) (appealability of district court's order rejecting proposed consent decree); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) (preclusive effect of state court judgment on later Title VII claim based on same facts); *United Air Lines v. Evans*, 431 U.S. 553 (1977), and *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (effects of Title VII time limitations for filing charges). In this brief, EEAC urges reversal of the decision below permitting a collateral attack on a consent decree by persons who had notice and opportunity to intervene

in the underlying Title VII litigation, but did not make a timely motion to do so.

STATEMENT OF THE CASE

The history of these proceedings is summarized in the decisions below and need not be reiterated at length here. The pertinent facts for purposes of this amicus curiae brief are as follows:

In 1979, after litigating for several years over complaints of discrimination in their employment practices, the City of Birmingham and the Jefferson County Personnel Board entered into negotiations with the United States, the Ensley Branch of the NAACP, and several individual black plaintiffs for the purpose of settling various consolidated cases. By 1981, the parties had reached agreement on language of two proposed consent decrees, one to be binding on the City and the other on the County Personnel Board. The proposed decrees included both long-term and interim annual goals for the hiring and promotion of blacks and women to positions as firefighters, fire lieutenants and other classifications.

Notice was then published in two local newspapers inviting "all persons who have an interest which may be affected by the Consent Decrees" to appear at a fairness hearing where they could present any objections they might have to the decrees. Similar notice was given by mail to the members of the subclasses alleged to have been discriminated against.

Among those who appeared at the fairness hearing and made arguments were the Birmingham Firefighters Association (BFA) and two of its members, represented by Raymond P. Fitzpatrick, Jr.,

Esq., counsel for the "reverse discrimination" claimants in this case. Mr. Fitzpatrick argued at the hearing that the decrees' race-conscious relief violated Title VII and the Fourteenth Amendment. He was invited by the court to present evidence in support of his objections, but he declined to do so.

After the fairness hearing but before the final approval of the decrees, Mr. Fitzpatrick's clients moved for the first time to intervene in the proceedings. The district court, in a ruling later upheld on appeal and not challenged here, denied the motion to intervene as untimely. Thereafter, on August 18, 1981, the court entered a final order approving the two decrees.

When the City announced the first promotions of black employees pursuant to the decrees, several competing white employees (all members of the BFA) represented again by Mr. Fitzpatrick, brought suit against the City and the Personnel Board in the district court, claiming "reverse discrimination" and seeking a preliminary injunction to halt enforcement of the decrees. When the court denied the preliminary relief they sought, these plaintiffs brought suit on the merits, claiming that the City and the Board were discriminating against them by certifying and promoting black candidates whose qualifications, they asserted, were inferior to theirs. Similar "reverse discrimination" complaints were filed in the district court by several other white City employees and their representatives and by the United States.

The district court consolidated all of the "reverse discrimination" actions, and thereafter, the plaintiffs from the original proceedings that had led to the consent decrees intervened as defendants in this con-

solidated litigation to defend the decrees. After a limited trial, the district court granted a motion to dismiss, holding that the plaintiffs' claims amounted to impermissible collateral attacks on the consent decrees, since the promotions they challenged were required by the decrees.

On appeal, a divided panel of the Eleventh Circuit reversed the district court's ruling dismissing the action. The majority reasoned that because the individual plaintiffs in the "reverse discrimination" actions "were neither parties nor privies to the consent decrees, . . . their independent claims of unlawful discrimination are not precluded." *Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498 (11th Cir. 1987).

SUMMARY OF ARGUMENT

Eight federal circuits have expressly or implicitly adopted the rule that collateral attacks on consent decrees settling employment discrimination suits are impermissible, and that the proper course for a person seeking to challenge such a decree is to intervene in the lawsuit underlying the decree itself.[2] This

[2] The decisions are tabulated by circuit in footnote 5, *infra* at p. 11.

We include in this list the Seventh Circuit, which endorsed the majority rule against collateral attacks in the employment discrimination context in *Grann v. City of Madison*, 738 F.2d 786, 794-796, *cert. denied*, 469 U.S. 918 (1984). Other briefs herein have ranked the Seventh Circuit along with the Eleventh as favoring the view that permits collateral attacks on consent decrees, citing *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986). That case, however, did not involve a decree settling employment discrimination claims. Rather, it addressed whether a state court suit by taxpayers challenging a county

procedure makes good, practical sense. It enables the court to hear and take account in a single proceeding of the arguments and objections of all those claiming to be affected, before deciding whether to approve, disapprove or modify a consent decree. It also cuts down on forum shopping in search of a judge who may disagree with the first judge's resolution of the issues. As a result, all parties, intervenors and the court benefit from the finality, certainty and efficiency of the judicial procedure. Only one circuit, the Eleventh, has rejected this approach in an employment discrimination case.[3]

The majority rule precluding collateral attacks on consent decrees in employment discrimination cases draws powerful support from Title VII's basic policy of promoting voluntary resolution of charges of dis-

government's agreement to build a new "Public Safety Complex" including a new city hall, police facilities and a new jail, was barred because the agreement was embodied in a consent decree settling a federal court class action by prisoners who claimed that conditions at the old jail violated the constitutional rights of pretrial detainees. The Seventh Circuit held that the taxpayers' suit was not barred, noting that the taxpayers were not parties to the consent decree, and that their right to challenge the county's authority to enter into the agreement to build the new complex could not be cut off without their participation. The court did not discuss whether the taxpayers had had any opportunity to intervene in the federal court action before the entry of the consent decree. Nor did the court make any reference to its earlier decision in *Grann v. City of Madison*.

[3] The Eleventh Circuit decisions are cited at footnote 7, *infra* at p. 13. *See also Ashley v. City of Jackson*, 464 U.S. 900 (1983) (Rehnquist, J., dissenting from denial of *certiorari*) ; and *see* footnote 2, *supra*.

crimination.[4] The understanding that a consent decree will not be subject to subsequent collateral attacks is typically an important part of the employer's incentive to give its consent to this form of settlement. One of the main benefits an employer can derive from such a decree is a final end to litigation over its challenged employment practices. Similarly, the benefits that flow to the courts and to the EEOC from such decrees through reduction of caseload pressures are substantially dependent on the decrees' finality.

The majority rule also derives strong support from the important policies of efficiency and consistency of judicial results that underlie the legal doctrines of preclusion and comity. As the court observed in *Prate v. Freedman*, 430 F. Supp. 1373, 1375 (W.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978), "To permit [collateral attack on a consent decree] would . . . result in continued uncertainty for all parties involved and render the concept of final judgments meaningless."

The concerns that prompted the Eleventh Circuit to reject this majority rule, and then-Associate Justice Rehnquist to question it in his opinion dissenting from the denial of *certiorari* in *Ashley v. City of Jackson* warrant serious consideration, but do not ultimately support reversal of the decision below in this case. Justice Rehnquist observed that it would be a denial of due process to make a decree binding on a litigant who "has never had an opportunity to

[4] This important federal policy is discussed in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), and *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 n.15 (1981).

be heard." 464 U.S. at 257. The Eleventh Circuit similarly expressed concern that the majority rule "deprives a nonparty to the decree of his day in court to assert the violation of his civil rights." *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983).

These criticisms assume that the persons seeking to challenge the decree were not given adequate notice of the litigation leading to the decree or of its potential effects on their interests, or were not afforded a fair chance to intervene in those proceedings to protect their interests. Such is not usually the case, however, where employment discrimination consent decrees are concerned. Rather, the case at bar is typical of most employment consent decree cases, in that timely notice of the proposed decree was given to "all persons who have an interest which may be affected by the Consent Decree." In these circumstances, the right of any potentially affected persons to intervene in the decree litigation by timely motion under Rule 24, Fed. R. Civ. P., gives them sufficient opportunity to have their "day in court" if they so desire.

The district court's refusal to allow the "reverse discrimination" claimants in this case to bring a collateral attack on the Title VII consent decrees could not be deemed a denial of due process. They had notice of the Title VII litigation, were fully aware of its potential impact on their interests, and were afforded ample opportunity to intervene therein. They simply delayed until too late before attempting to do so, and let their chance slip past.

This case, then, is much like *National Wildlife Federation v. Gorsuch*, 744 F.2d 963, 968-72 (3d Cir. 1984), wherein the Third Circuit upheld the dismissal of a collateral attack on a consent decree in an environmental case with an observation equally fitting here:

> Clearly, plaintiffs were not outsiders unaware of litigation in progress that would ultimately affect their interests. In a deliberate choice of litigation strategy, they chose to stand on the sidelines, wary but not active, deeply interested, but of their own volition not participants. Although plaintiffs may not have had their day in court as litigants, they had the opportunity and for reasons of their own adopted a different approach. Plaintiffs cannot, at this point, assert persuasively that the interest of finality should not prevail.

744 F.2d at 971-72. In these circumstances, due process does not require subordination of the interests of finality, consistency, efficiency and judicial economy that the majority rule barring collateral attacks is designed to promote.

ARGUMENT

A TITLE VII CONSENT DECREE SHOULD NOT BE OPEN TO ATTACK IN A LATER-FILED, COLLATERAL LAWSUIT BY PERSONS WHO HAD NOTICE AND AN OPPORTUNITY TO BE HEARD IN THE LITIGATION UNDERLYING THE DECREE BUT MADE NO TIMELY MOTION TO INTERVENE.

A. Intervention Provides a Practical Mechanism for Protecting the Interests of All Potentially-Affected Persons Without Impairing Title VII's Goal of Fostering Voluntary Resolution of Discrimination Claims.

As noted, at least eight circuits have either expressly adopted or implicitly endorsed the rule barring collateral attacks on consent decrees in employment discrimination cases.[5] In doing so, the courts

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[5] First Circuit: *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1980) (dictum);

Second Circuit: *Marino v. Ortiz*, 806 F.2d 1144, 1146 (1986), *affirmed*, 108 S. Ct. 586 (1988); *Prate v. Freedman*, 430 F. Supp. 1373, 1375 (W.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (1977), *cert. denied*, 436 U.S. 922 (1978);

Third Circuit: *O'Burn v. Shapp*, 70 F.R.D. 549 (E.D. Pa.), *aff'd mem. sub nom. Lutz v. Shapp*, 546 F.2d 417 (1976), *cert. denied*, 430 U.S. 968 (1977); *c.f. National Wildlife Federation v. Gorsuch*, 744 F.2d 963, 968-72 (1984) (Third party collateral attack on consent decree under Environmental Protection Act held barred);

Fourth Circuit: *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62, 64 (1981), *cert. denied*, 455 U.S. 940 (1982);

Fifth Circuit: *Thaggard v. City of Jackson*, 687 F.2d 66, 68-69 (1982), *cert. denied sub nom. Ashley v. City of Jackson, Mississippi*, 464 U.S. 900 (1983);

Sixth Circuit: *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 558 (1982), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Black*

have emphasized that those seeking to challenge the consent decrees in question could have moved to intervene in the underlying litigation and thereby made their objections known to the court in the context of the same action, rather than bringing separate lawsuits. *E.g., Thaggard v. City of Jackson*, 687 F.2d at 68; *Black & White Children of Pontiac v. School District of City of Pontiac*, 464 F.2d at 1030.

This procedure is eminently sensible. Intervention is liberally available in Title VII proceedings. Under Rule 24, Fed. R. Civ. P., anyone who claims an interest relating to the subject matter of a lawsuit and is "so situated that the disposition of the action may as a practical matter impair or impede [that person's] ability to protect that interest" has an unconditional right to intervene simply by making a timely application to the court, unless his or her interest is already adequately represented by an existing party. Fed. R. Civ. P. 24(a). Even where not available as an unconditional right, intervention is permitted in the court's discretion under Fed. R. Civ. P. 24(b) whenever "an applicant's claim or defense and the main action have a question of law or fact in common." Thus, any persons or groups that have reason to think their job rights might be affected by a consent decree in a Title VII action will ordinarily have an opportunity to participate in that litigation

& White Children of Pontiac v. School District of City of Pontiac, 464 F.2d 1030 (1972);

Seventh Circuit: *Grann v. City of Madison*, 738 F.2d 786, 796, *cert. denied*, 469 U.S. 918 (1984); *but see Dunn v. Carey*, 808 F.2d 555 (1986), discussed at footnote 2, *supra.*;

Ninth Circuit: *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694 (1981).

and make their interests known to the court, simply by making a timely application to intervene.[6]

This approach has manifest advantages over that followed in the Eleventh Circuit, where individuals who have failed to seek timely intervention to challenge a Title VII consent decree are permitted to "institute an independent lawsuit and assert the specific violations of their rights."[7] The majority approach permits the resolution of issues relating to the same employer and the same consent decree to be addressed in a single lawsuit by a single court having all the interested parties before it, instead of forcing the courts to deal with such issues on a piecemeal basis, as they must under the Eleventh Circuit's approach.

Furthermore, as the other circuits have recognized, a rule encouraging collateral attacks on consent decrees "would mean that the parties to the consent decrees could 'be faced with either inconsistent or

[6] The requirement that the application be timely is to be applied flexibly in the discretion of the court, and the point to which the litigation has progressed is one factor to be considered by the court in deciding whether to allow intervention, but is not necessarily determinative. *See Culbreath v. Dukakis*, 630 F.2d at 17, and cases there cited. Thus, while intervention has been denied in some instances because, as in this case, the applicants delayed unreasonably, persons seeking to challenge a consent decree after its issuance may still be permitted to intervene for that purpose if, for example, the court concludes that it would not have been reasonable in the circumstances to have expected them to recognize the potential effects of the litigation on their rights at an earlier stage.

[7] *Reeves v. Wilkes*, 754 F.2d 965, 971 (11th Cir. 1985). *See also United States v. Jefferson County*, 720 F.2d 1511, 1518 & n.20 (11th Cir. 1983).

contradictory proceedings.'" *Thaggard v. City of Jackson*, 687 F.2d at 68, quoting *O'Burn v. Shapp*, 70 F.R.D. at 552. Thus, to permit such collateral attacks would "result in continued uncertainty for all parties involved and render the concept of final judgments meaningless." *Thaggard*, 687 F.2d at 69, quoting *Prate v. Freedman*, 430 F. Supp. at 1375.

For these reasons, the circuits following the majority rule have correctly recognized that to allow collateral attacks on consent decrees "would be to thwart the goal of Title VII of encouraging settlement of complaints through voluntary compliance." *Grann v. City of Madison*, 738 F.2d at 796; *Thaggard*, 687 F.2d at 69; *Dennison v. City of Los Angeles*, 658 F.2d at 696. As this Court has emphasized, "Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII's goal of equality of employment opportunities]." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). *See also Local Number 93 v. City of Cleveland*, 106 S.Ct. 3063, 3072 (1986); *Weise v. Syracuse University*, 522 F.2d 397, 411-12 (2d Cir. 1975); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 497-98 (5th Cir. 1968). Consent decrees are an important mechanism for implementing that policy.

Indeed, it was in recognition of the "strong preference for encouraging voluntary settlement of employment discrimination claims" that this Court held that a district court's rejection of a proposed consent decree must be treated as an immediately appealable order. *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). For, as the Court noted, one of the major reasons why parties agree to consent decrees is "to avoid the costs and uncertainties of litigation." Consequently, a court's rejection of such a proposed decree could "have the 'serious, perhaps irreparable, consequence' of denying the parties the right to compromise their dispute on mutually agreeable terms." *Id.* at 87-88. These policy concerns lead to the conclusion that potential challenges to a consent decree should be presented and resolved as expeditiously as possible.

A rule leaving such decrees open to collateral attack would similarly undermine the statutory policy of fostering settlements. For, as several circuits have pointed out, to allow collateral attacks on Title VII consent decrees would effectively place the employer "in the impossible situation of facing suit by minority employees if it fails to correct past discrimination and facing suit by non-minority employees if it corrects past practices." *Grann*, 738 F.2d at 794. "The [employer] would in effect be forced to walk a tightrope. If it refused to enter into the consent decree, it would be potentially liable to the [minority] plaintiffs. If it did enter into the agreement, it would be subject to suits for compensation by non-minority employees." *Dennison*, 658 F.2d at 696.

Title VII, of course, protects non-minorities as well as minorities,[8] and the statutory preference for voluntary settlements should not be implemented in a way that wholly deprives persons or groups who believe their rights have been affected adversely by a consent degree of a forum in which to challenge the decree. But there is no such deprivation where, as here, such persons have been afforded a fair opportunity to intervene in the litigation giving rise to the

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[8] *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

consent decree. Rather, in this situation, the forum has been provided in the underlying Title VII litigation, and the manifest practicalities of the situation strongly favor requiring that any such challenge be brought in that forum, rather than a separate lawsuit.

It would not be workable to require joinder under Rule 19, Fed. R. Civ. P., of every person who might claim to be affected by a broad-scale employment discrimination consent decree like the ones in this case. Neither the parties negotiating the decree nor the court would have the means to identify every individual who could potentially assert such an interest. Moreover, even if they could be identified and joined, the sheer number of parties who would then have to be brought before the court in order to settle a complaint of systemic discrimination by a large employer, such as a city or county government or a major corporation, would overwhelm the process.

The approach favored by the majority of the circuits is far more practical and still fully adequate to assure due process to all concerned. It effectively places the initial burden on the parties to the consent decree negotiations to give clear and sufficient notice of the proposed decree to all those whose interests might be affected, and to do so far enough in advance of the decree's final approval so that anyone who so desires can make a timely motion to intervene. Once sufficient notice has been given, it is both fair and sensible to require those who wish to challenge a proposed decree to identify themselves and to make their objections in the context of the same proceedings, rather than to wait and bring a separate attack after the decree has been finalized.

B. Due Process Is Satisfied Where Those Challenging a Consent Decree Have Had Fair Notice and Opportunity to Intervene in the Underlying Title VII Litigation.

The requirements of due process can be satisfied in a variety of ways. What is essential "in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

As discussed above, Rule 24, Fed. R. Civ. P., affords those who fear that their interests may be affected adversely by a Title VII consent decree an "opportunity to present their objections" by moving to intervene in the litigation giving rise to the decree. Thus, as long as they have been given adequate notice of the consent decree and its potential impact on them, the opportunity to intervene should be sufficient to satisfy due process. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 114 (1968) (Suggesting, without deciding, that a nonparty who had purposely bypassed an adequate opportunity to intervene might be bound by a previous decision). Due process does not require that they necessarily be granted their "day in court" in the context of a *separate* lawsuit. *National Wildlife Federation v. Gorsuch*, 744 F.2d 963, 968-72 (3d Cir. 1984).

The Third Circuit's opinion in *National Wildlife Federation* illustrates that a court can be amply sensitive to the due process rights of persons claiming to be affected by a consent decree without granting them an unrestricted right to bring collateral at-

tacks thereon. Thus, the court emphasized that "due process accords a person a day in court" and that ordinarily "a stranger to a lawsuit is not under a duty to intervene," 744 F.2d at 969, but nevertheless concluded that a decree could properly be given preclusive effect against a group that "was aware of the [decree litigation] from the outset, and made a strategic decision not to intervene. . . ." *Id. at* 970.

The record of this case does not support a claim that the district court denied the "reverse discrimination" plaintiffs due process by barring them from using this lawsuit as a vehicle to attack the consent decree setting the underlying *Birmingham* and *Jefferson County* discrimination litigation. Rather, like the plaintiffs in the *National Wildlife Federation* case, the plaintiffs here were afforded ample opportunity to "have . . . their day in court as litigants" but "for reasons of their own adopted a different approach." 744 at 972. They clearly had notice of that litigation and were fully aware of its potential impact on them. Indeed, Attorney Fitzpatrick appeared at the fairness hearing on the proposed decree, and spoke in opposition to the decree on essentially the same grounds he has attempted to raise on their behalf in this collateral proceeding. The "reverse discrimination" plaintiffs also were plainly aware of their right under the federal rules to seek intervention in the underlying Title VII action. Indeed, there has been no contention in this case that any of the plaintiffs in the current actions did not have notice of the consent decree proceedings in time to make a timely motion to intervene therein, had they wished to do so. Yet, "[i]n a deliberate choice of litigation strategy," *id.* at 971, they opted not to move to intervene until after the fairness hearing was over, a time which the district court reasonably concluded was too late.

In sum, the constitutional guarantee of due process requires that persons claiming to be affected by a consent decree be afforded a fair opportunity to present their objections before it is given preclusive effect against them, but it does not require that they be given a choice of proceedings in which to do so. Where, as here, compelling public policy interests weigh heavily in favor of resolving the conflicting interests of all those who stand to be affected by a consent decree in a single proceeding before the same judge, and all persons or groups claiming such interests have been notified and given the chance to participate in that proceeding, the constitutional requirement of due process has been satisfied.

CONCLUSION

For the reasons stated above, amicus curiae EEAC respectfully submits that the decision of the court of appeals allowing this "reverse discrimination" lawsuit to proceed as a collateral attack on the Title VII consent decrees should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN W. MARTIN, *et al.*,

Petitioners,

—v.—

ROBERT K. WILKS, *et al.*,

Respondents,

RICHARD ARRINGTON, JR., *et al.*,

Petitioners,

—v.—

ROBERT K. WILKS, *et al.*,

Respondents,

THE PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,

Petitioners,

—v.—

ROBERT K. WILKS, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ALABAMA CIVIL LIBERTIES UNION, AND WOMEN'S EQUITY ACTION LEAGUE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does due process require that a non-party to a Title VII lawsuit resulting in a consent decree, who has notice and an opportunity to be heard on the decree before it is entered, also be allowed to attack the decree in an independent lawsuit upon the same grounds as were previously presented as objections to entry of the decree?

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Penn-Central Merger and N & W Inclusion Cases, 389 U.S. 486 (1968) . . . . . passim

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Anderson, Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation, 1983 U.Ill.L.Rev. 579 10

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INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with over 250,000 members dedicated to the principles of individual liberty embodied in the Constitution. The Alabama Civil Liberties Union is one of its statewide affiliates.

The ACLU is actively involved in civil rights litigation throughout the country, and is a party to numerous consent decrees under Title VII and other civil rights statutes. The ACLU, therefore, has a direct organizational interest in the question of whether, and under what circumstances, civil rights consent decrees may be subject to collateral attack.

1/ Pursuant to Rule 36.2 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

The Women's Equity Action League (WEAL) was founded in 1968 as a national, nonprofit membership organization sponsoring research, education, litigation, and advocacy in support of the economic advancement of women. Central to that advancement is the full and effective enforcement of anti-discrimination laws to ensure equal opportunity for all.

WEAL actively supports litigation on behalf of women and has a vested interest in the integrity of consent decrees which it has entered into on behalf of its members. See e.g., Weal v. Califano (D.D.C., Civ. Action No. 74-1720). In addition, WEAL has appeared before this Court as amicus curiae in support of other affirmative action decisions including United Steelworkers v. Weber, 443 U.S. 193 (1979),

and Johnson v. Transportation Agency, 107 S.Ct. 1442 (1987).

STATEMENT OF THE CASE

Amici adopt the Statement of the Case found in the brief of Petitioners John W. Martin, et al.

SUMMARY OF ARGUMENT

The issue before this Court is a narrow one: Whether the court of appeals erred in holding that individuals having notice of, and an opportunity to be heard with respect to, a proposed Title VII consent decree are constitutionally entitled to attack the consent decree in subsequent independent lawsuits.[2/] In this

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2/ In this Brief, an independent lawsuit which seeks to invalidate a consent decree previously entered in a Title VII case is described as a "collateral attack" upon the decree. See generally Striff v. Mason, 849 F.2d 240 (6th Cir. 1988); Marino v. Ortiz, 806 F.2d 1144 (2d Cir. 1986), aff'd by equally divided Court, 108 S.Ct. 586 (1988); Thaggard v. City of Jackson, 687 F.2d

(continued...)

case, Respondents had actual notice for years of the pendency of Title VII litigation that may affect their employment rights; they had an opportunity to intervene virtually from the inception of the underlying Title VII litigation and for years thereafter; they were invited to participate actively in a judicial hearing to evaluate the fairness of the proposed consent decrees terminating such litigation; they had the very arguments they now assert brought before the court during the fairness hearing;[3/] and they have a con-

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2/ (...continued)
66 (5th Cir. 1982), cert. denied sub nom., Ashley v. City of Jackson, 464 U.S. 900 (1983); Dennison v. City of Los Angeles Dep't of Water and Power, 658 F.2d 694 (9th Cir. 1981).

3/ The Birmingham Firefighters Association ("BFA") and two of its members, represented by the same counsel who now represents Respondents, appeared as amici curiae at the fairness hearing to object to the proposed terms of the consent decree.

tinuing opportunity to intervene in the underlying Title VII litigation to assert claims that any employment actions taken thereunder actually violate the consent decree, or that changed circumstances require judicial reexamination of the fairness or lawfulness of the decree. Amici respectfully submits that whatever may be the minimum due process rights of nonparties to participate in, and challenge, consent decrees, they were satisfied by a comfortable margin in this case.

Permitting Respondents collaterally to attack the decree in a subsequent independent lawsuit, as the court of appeals has done here, jeopardizes important public policies that encourage parties voluntarily to agree to resolve Title VII class action litigation. Allowing such attacks would remove most of the incentives which parties

have in such cases to negotiate an end to their legal dispute, thus delaying implementation of a remedy, increasing litigation costs, prolonging uncertainty for employers and employees about their future, and frustrating important principles of finality and repose that underlie judicial orders and decrees.

ARGUMENT

I. VITAL PUBLIC POLICIES ENCOURAGING VOLUNTARY COMPLIANCE WITH TITLE VII AND GIVING FINALITY TO JUDGMENTS WOULD BE SERIOUSLY UNDERMINED BY PERMITTING COLLATERAL ATTACKS UPON TITLE VII CONSENT DECREES

Due process is a flexible standard that takes form and meaning only when discussed within the context of the particular rights at stake. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). When it is determined that due process is applicable, the question becomes how much process is due. See

Mathews v. Eldridge, 424 U.S. 319, 349 (1976). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). Thus, in determining what process is due nonparties who wish to attack consent decrees previously entered in Title VII litigation, the role of the consent decree, the public purpose it serves, and the procedures afforded to interested nonparties both before and after its entry, are all critically important.

A. Consent Decrees Play A Vital, Salutary Role In Contemporary Civil Rights Litigation

This Court has "on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title

VII." Local No. 93, Int'l Ass'n of Fire-fighters v. City of Cleveland, 106 S.Ct. 3063, 3072 (1986). See also Johnson v. Transportation Agency, 107 S.Ct. 1442, 1457 (1987); W.R. Grace & Co. v. Local Union 759, Rubber Workers, 461 U.S. 757, 770 (1983)("[v]oluntary compliance with Title VII . . . is an important public policy."); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Consensual resolution of disputes involving Title VII is no doubt the most effective means of achieving the statute's goal of eradicating discrimination:

> A remedy designed to reform the workings of a large organization is most effective when the organization cooperates in carrying out the remedy, and the human beings who make up an institution are more apt to cooperate in carrying out a negotiated scheme than in complying with an order imposed from above by a court.

Schwarzschild, Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 Duke L.J. 887, 899 ("Schwarzschild").

Where a Title VII dispute has required resort to the courts before agreement among the parties can be achieved, consent decrees have been the preferred vehicle for ensuring the efficacy of the settlement. First appearing in the context of antitrust suits, see, e.g., Swift & Co. v. United States, 276 U.S. 311, 319-20 (1928), consent decrees are now almost routine in many civil rights litigation contexts, including hospital and prison litigation, school and housing desegregation suits, and equal employment claims. See Schwarzschild, supra.

Special characteristics inherent in civil rights litigation make consensual resolution particularly beneficial. See Anderson, Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation, 1983 U.Ill.L.Rev. 579. First, plaintiffs in such litigation often are held to be entitled to "a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer." Chayes, The Role of the Judge in Public Law Litigation, 89 Harv.L.Rev. 1281, 1298 (1976). Such relief is more likely to encounter bureaucratic resistance and delay within a defendant organization when ordered by a judge after a lengthy, contentious trial on the merits than if it were agreed upon through negotiation.4/ Consen-

4/ See, e.g., New York Times, August 2, 1988, at A1, col. 4 ("Yonkers Council, in Four to Three (continued...)

sual settlement thus acts as a lubricant for often-time reluctant compliance with Title VII's mandate.

Second, settlement significantly reduces litigation costs, both monetary and intangible. Particularly in the context of public agency defendants, the latter may be at least as significant as the former,5/ since a settlement usually avoids potentially embarrassing adverse findings against public bodies and officials that tend to hinder cooperation on long term solutions. In these cases it is often in the interest of all parties to reduce

4/ (...continued)
Vote, Defies Judge on Integration Plan").

5/ Title VII class action litigation often requires large expenditures of public funds. If plaintiffs prevail, they are ordinarily entitled to recover reasonable attorneys' fees from defendants, and such fees inevitably are far greater if plaintiffs prevail after a lengthy trial than if the case settles through negotiation.

tensions by seeking agreement upon a remedy, rather than engaging in all-out litigation.

Civil rights cases also may present complex and controversial difficulties that are less susceptible than private disputes to expeditious judicial resolution. While a lawsuit may have to be filed in order to achieve compliance with Title VII, a full trial on the merits often can be avoided. Leaders of defendant institutions and plaintiff groups often become better aware of the strengths and weaknesses of their legal position after a lawsuit commences, and are then willing to negotiate a resolution of the claims without substantial judicial involvement. Parties who present the court with agreed-upon solutions to their problems perform a valuable service to courts faced with an avalanche of liti-

gation. The judiciary therefore has special reason to protect and encourage the settlement process in such cases. See Armstrong v. Board of School Directors, 616 F.2d 305, 324-25 (7th Cir. 1980)("Thus, when a school desegregation suit is settled prior to its remedial portion, a potentially complex and time-consuming segment of the litigation may be avoided").

In addition, voluntary settlement mitigates an often-stated theoretical objection to judicially crafted institutional reform: the danger of unwisely or unnecessarily upsetting an elaborate, organic network of institutional and social relationships. The parties, working together, may craft a settlement that can more easily take account of their particular needs. While the parties know their institutions and the people who comprise

them, and usually have intimate familiarity with the underlying problems, few judges have similarly detailed knowledge -- or the time to acquire it -- which may be required to draft as appropriate and effective a decree as can the parties themselves. Thus, the process of negotiation and consent may often achieve a more finely tuned remedy than a fully adversarial resolution.

In addition to these important concerns relating particularly to Title VII litigation seeking institutional reform, the court of appeals' decision in this case also frustrates the more generic interests in finality of judgment and repose for litigants. This Court frequently has observed that according finality to judgments serves important objectives of preserving judicial resources, preventing costly and vexatious multiple lawsuits, and

minimizing the risk of inconsistent decisions. See University of Tennessee v. Elliot, 106 S.Ct. 3220, 3226 (1986); Kremer v. Chemical Construction Corp., 456 U.S. 461, 466 n.6 (1982); Montana v. United States, 440 U.S. 147, 153-54 (1979). See also United States v. Yonkers Bd. of Educ., 801 F.2d 593, 596 (2d Cir. 1986).

By protecting the finality of a consent decree, the court speeds the process of adjudication toward implementation of a constructive remedy for unlawful employment practices. Where there is no incentive to settle, the parties' energies are consumed by building up their own cases and tearing down their opponents'. On the other hand, if a consent decree is entered with some assurances to the parties of finality and repose, the focus can shift to actual implementation of the agreed-upon remedies

and compensation for the victims of discrimination.

Litigants clearly rely on these advantages when they enter such consensual arrangements:

> A consent decree has several other advantages as a means of settling litigation . . . . And it is likely to be easier to channel litigation concerning the validity and implications of a consent decree into a single forum -- the court that entered the decree -- thus avoiding the waste of resources and the risk of inconsistent or conflicting obligations.

Brief for National League of Cities, et al., as Amicus Curiae, quoted in Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S.Ct. at 3076 n.13.

Thus, the consent decree has played a major role in modern civil rights litigation. In the employment discrimination context, it has substantially promoted achievement of those goals intended by

Congress to be met through settlement of Title VII claims by the parties themselves: remedies that appropriately take into consideration the intricate and complex factual circumstances that typically surround such litigation; speedier and less costly resolution of claims; and conservation of scarce judicial resources.

B. Permitting Collateral Attacks Upon Title VII Consent Decrees Would Greatly Reduce Their Efficacy And Create Interminable Uncertainties For Employers and Employees

The vital public interests in remedying discrimination and in finality of judgments are substantially undermined by the decision of the Eleventh Circuit, which allows collateral attacks on consent decrees by individuals who had actual notice and an opportunity to be heard with respect to the decree before it was entered. Permitting collateral attacks on

consent decrees under these circumstances unnecessarily burdens the courts and the parties with the likelihood of unending litigation that may prevent entirely any consensual remediation of important employment discrimination claims.

After all, it is the finality of the consent decree which, by allowing the parties to rely on the terms of the decree, makes settlement of complex civil rights litigation a rational option for the parties. If a consent decree were subject to repeated attack by individuals who were not parties to the initial litigation, no reasonable party would enter into such a nonbinding settlement, and no court would wish to waste its time reviewing and approving a decree which would likely serve only as a prelude to a series of additional lawsuits.

As this case demonstrates, the invitation to file collateral actions may result in endless litigation: more than 40 separate claims have already been raised challenging the consent decree involved here.6/ Indeed, given the characteristics of class action Title VII litigation, it is virtually certain that at least one person may wish to object to <u>any</u> specific remedy that is devised. One objector who succeeds in altering the original terms of a consent decree would be a model for other objectors wishing to challenge the terms of subsequent relief. <u>Cf</u>. <u>Yonkers Bd. of Educ.</u>, 801 F.2d at 596. Thus, the original parties would be subject to virtually unending litigation, with a consequent waste of judicial resources. <u>See</u> <u>Thaggard</u>

6/ <u>E.g.</u>, J.A. 172-74, 185-87, 293-94, 307-08, 314-15, 331-32.

v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), cert. denied sub nom., Ashley v. City of Jackson, 464 U.S. 900 (1983); Hefner v. New Orleans Pub. Serv., Inc., 605 F.2d 893, 898 (5th Cir. 1979), appeal dismissed and cert. denied, 445 U.S. 955 (1980); Prate v. Freedman, 430 F.Supp. 1373, 1375 (W.D.N.Y.), aff'd mem., 573 F.2d 1294 (2d Cir. 1977), cert. denied, 436 U.S. 922 (1978).

Moreover, collateral attacks on consent decrees that have been carefully reviewed and approved by a court of competent jurisdiction necessarily call upon the second court to reconsider a decision in an earlier case, perhaps by a different judge or a different court.7/ "The proper exer-

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7/ Because of the potential for uncertainty, unending litigation, and the possibility of inconsistent obligations, employers would have little incentive to compromise their claims and (continued...)

cise of restraint in the name of comity keeps to a minimum the conflicts between courts administering the same law, conserves judicial time and expense, and has a salutary effect upon the prompt and efficient administration of justice." Bergh v. State of Washington, 535 F.2d 505, 507 (9th Cir.), cert. denied, 429 U.S. 921 (1976), quoting Brittingham v. Commissioner, 451 F.2d 315, 318 (5th Cir. 1971)(comment by Justice (then Judge) Kennedy in barring a collateral attack of a litigated judgment).

7/ (...continued)
enter into voluntary settlements.

> The Department would in effect be forced to walk a tightrope. If it refused to enter into the consent decree, it would be potentially liable to the [minority employees]. If it did enter into the agreement, it would be subject to suits for compensation by non-minority employees. Cf. United Steelworkers v Weber, 443 U.S. 193, 209, 99 S.Ct. 2721, 2730, 61 L. Ed. 2d 480 (1979)(Blackmun J. concurring).

Dennison, 658 F.2d at 696.

"To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. United States, 440 U.S. at 153-54. Those same considerations of comity apply to a rule prohibiting collateral attacks of Title VII consent decrees by persons who had notice and opportunity to be heard prior to entry of the decree. All of these interests are jeopardized by the Eleventh Circuit rule freely permitting collateral attacks, even by those who had actual notice and an opportunity to be heard.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT DUE PROCESS REQUIRES THAT A NONPARTY TO A TITLE VII CONSENT DECREE WHO HAS NOTICE AND AN OPPORTUNITY TO BE HEARD ON THE DECREE BEFORE IT IS ENTERED MUST ALSO BE ALLOWED TO ATTACK THE DECREE IN AN INDEPENDENT LAWSUIT

A. Due Process Does Not Invariably Limit The Binding Effect Of A Judgment To Parties To The Suit

Without appropriately discussing the context of its ruling, the Eleventh Circuit held that Respondents could not be prevented from attacking the consent decree because they were not formal parties to the litigation underlying it, even though there had been no question that Respondents received notice and an opportunity to be heard before the decree was entered. In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1498 (11th Cir. 1987). See Pet.App. 3a-24a.[8/] The

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[8/] The Eleventh Circuit explicitly noted "the due process underpinnings of preclusion law" in the (continued...)

court based this conclusion on "the same principles of res judicata and collateral estoppel that govern ordinary judgments . . . ." Id. However, the preclusion of a nonparty from litigating issues resolved in prior litigation, where the nonparty had notice and an opportunity to be heard therein, is not inconsistent per se with the requirements of due process. In this case the due process requirements prerequisite to foreclosing a collateral attack by Respondents upon the consent decree were satisfied by a comfortable margin: Respondents do not even allege inadequate notice; they had literally years to intervene between their having notice of the

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8/ (...continued)
decision appealed from in this action. See In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d at 1498. See Pet.App. 3a-24a.

lawsuit and entry of the consent decree;9/ as "persons who have an interest which may be affected by the Consent Decrees," Pet.App. 22a-23a, they were invited to participate and present objections at the fairness hearing that preceded judicial approval of the decree; and objections to the decree were in fact heard by the district court in language almost indistinguishable from that contained in Respondents' subsequent complaints.

9/ As the court of appeals observed:

> [They] knew at an early stage in the proceedings that their rights could be adversely affected, as was evidenced by their conversations with the City regarding the tactics the City should take in defending the action . . . . [They] chose to wait until after two trials and a long complex negotiation process had taken place [before seeking intervention].

U.S. v. Jefferson County, 720 F.2d 1511, 1516-17 (11th Cir. 1983). J.A. 149.

The fundamental right guaranteed by due process is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314. The due process clause has never been held by this Court to require that a nonparty must always be allowed to contest the results of prior litigation through collateral attack. Indeed, the principle underlying this Court's decision in Penn-Central Merger and N & W Inclusion Cases, 389 U.S. 486 (1968), is that nonparties may, in appropriate circumstances, be collaterally estopped from relitigating judgments when they knowingly avoid participation in the original action.

In Penn-Central Merger, numerous plaintiffs filed challenges in several district courts to the Interstate Commerce Commission's approval of the merger of the Pennsylvania and New York Central railroads. The City of Scranton and a stockholder in the Pennsylvania Railroad filed complaints in the Southern District of New York. When the district court ordered them to file supplemental complaints, Scranton and the stockholder declined to comply, choosing instead to challenge the merger in the Middle District of Pennsylvania, where they had intervened in an action filed by the Borough of Moosic. The Pennsylvania court stayed the Moosic action pending a determination of the merits in the New York case. The New York court dismissed all complaints challenging the merger and upheld the I.C.C.'s decisions, whereupon

Scranton, the stockholder, and Moosic sought to go forward with their complaints in the Middle District of Pennsylvania. This Court held that the New York decision was binding both on Scranton and the stockholder, who were parties to the New York proceedings, and on Moosic, which, although neither a party nor an intervenor, "had an adequate opportunity to join in the litigation in that court following the stay of proceedings in the Middle District of Pennsylvania." 389 U.S. at 505.10/ This Court observed:

> [A]ll district courts in which actions to review the Commission's findings or for injunctive relief were filed continued their proceedings in deference to the New York court. All parties with standing to challenge the Commission's action might have joined in the New York proceedings. In these circumstances, it necessarily follows that the decision of the New York court which, with certain exceptions, we have affirmed, precludes further judicial review or adjudication of the issues upon which it passes.

389 U.S. at 505-06 (footnote omitted).11/ Cf. McKinney v. Alabama, 424 U.S. 669 (1976)(defendant in criminal obscenity proceeding may not be bound by a civil obscenity judgment when he did not have

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10/ In effect, the stay of the Pennsylvania action put Moosic on notice that its rights were likely to be determined by the outcome in New York. Likewise, Respondents in this case were fully aware that their interests would inevitably be affected by the final terms of the consent decree.

11/ In determining that the Borough of Moosic in Penn-Central Merger was precluded from relitigating the issues determined in the New York action, the court implicitly found that the notice and opportunity to be heard afforded Moosic in the prior litigation satisfied the due process clause, even though Moosic had not been a party. Thus, the broad statement in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979), that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore had never had an opportunity to be heard" is qualified by decisions such as Penn-Central Merger.

notice or an opportunity to participate in the earlier proceeding); Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968).

In addition, several courts of appeals have followed Penn-Central Merger in precluding nonparties from relitigating issues presented in a prior action in appropriate circumstances, such as: (1) when the nonparty declined to participate in the prior action despite a judicial invitation to do so; or (2) when the nonparty failed to appeal from the denial of a motion to intervene in the original action.

For example, in Safir v. Dole, 718 F.2d 475, 483 (D.C. Cir. 1983), cert. denied, 467 U.S. 1206 (1984), the Court of Appeals for the District of Columbia Circuit cited both Patterson and Penn-Central Merger in holding that a group of shipping

lines was estopped from collaterally challenging a decision by the Secretary of Commerce requiring the lines to repay approximately $1 million in subsidies. Although the shippers' claims in Safir were inconsistent with the holding of the Second Circuit in a related case, the shippers argued that they could not be collaterally estopped because they did not participate in the Second Circuit proceedings. The court, in an opinion written by Justice (then Judge) Scalia, first observed that the shippers had "sedulously abstain[ed]" from intervening despite an invitation by the Second Circuit to do so. 718 F.2d at 483, quoting Safir v. Gibson, 432 F.2d 137, 145 (2d Cir. 1970)(on petition for rehearing), cert. denied sub nom., American Export Isbrandtsen Lines, Inc. v. Safir, 400 U.S. 942 (1970). The court then held

that because it "appear[ed] that the trade lines had full opportunity to argue the issue under discussion," it was "enough in law and reason to work a collateral estoppel." 718 F.2d at 483.12/

Similarly, in a case more closely analogous to the instant action, the Third Circuit held in National Wildlife Fed'n v. Gorsuch, 744 F.2d 963 (3d Cir. 1984), that plaintiffs who had not timely intervened in an earlier lawsuit could not attack the terms of consent decrees to which they were not parties. The Gorsuch plaintiffs sought injunctive relief requiring six New Jersey sewage authorities to discontinue dumping sewage sludge into the Atlantic Ocean. A year before the Gorsuch plaintiffs filed suit, litigation concerning sludge dumping had commenced in the Southern District of New York and in the District of New Jersey. The district court in New York directed the EPA to revise its dumping regulations, but allowed New York City to continue ocean dumping. The New Jersey actions resulted in consent decrees that mirrored the order entered in the New York case. The Third Circuit in Gorsuch affirmed the denial of the plaintiffs' attempt to modify the

12/ In addition, the D.C. Circuit followed the Penn-Central Merger reasoning and bound a nonparty by the terms of a prior determination in Rosen v. National Labor Relations Board, 735 F.2d 564 (D.C. Cir. 1984). The court also explicitly found that result to comport with the requirements of due process. In Rosen, an administrative law judge adjudicating a certification and unfair labor practice charge hearing included among his findings of fact a statement that one of the employer's attorneys handling the case had suborned perjury. The attorney subsequently brought a civil action alleging that the finding violated his due process rights because he had had no opportunity to present evidence at the hearing on the issue. The court concluded that even if due process required that the attorney have an effective right to contest the findings of the administrative law judge, he had that right in the form of a right of intervention in the Board proceedings. Having failed to exercise it, he had no right to a collateral hearing. 735 F.2d at 573.

decrees, noting that the plaintiffs were aware of the earlier suits and knew that their interests were involved, yet deliberately chose not to intervene in the New York suit or to appeal the denial of their motion to intervene in the New Jersey action. The court of appeals concluded:

> Although the plaintiffs may not have had their day in court as litigants, they had the opportunity and for reasons of their own adopted a different approach. Plaintiffs cannot, at this stage, assert persuasively that the interest of finality should not prevail.

744 F.2d at 971-72. See also Western Shoshone Legal Defense & Education Ass'n v. United States, 531 F.2d 495, 502 (Ct.Cl.), cert. denied, 429 U.S. 885 (1976)("[T]he law is developing a critical eye toward persons who, knowing that a pending action is designed to stabilize legal relationships that concern them, deliberately stay out of that litigation although they could

easily enter it."); Cummins Diesel Michigan, Inc. v. The Falcon, 305 F.2d 721, 723 (7th Cir. 1962)(rejecting argument that ownership of a vessel could not be determined without joining a particular nonparty on the grounds that the nonparty had an opportunity to intervene but refused, and therefore is bound by the decree).

The result in Penn-Central Merger is entirely consistent with this Court's traditional due process analysis. The due process clause does not require party status as a prerequisite to finality in all circumstances, but rather an analysis of the appropriateness of binding persons by a prior judgment in the particular circumstances presented. As this Court observed in Mullane, to determine what process is due a court must look both to the govern-

mental interest in finality and the individual interest protected by the due process clause. 339 U.S. at 313-14.

B. Due Process Does Not Require That Persons Having Notice And An Opportunity To Be Heard On A Proposed Title VII Consent Decree Also Must Be Allowed To File An Independent Lawsuit Attacking The Decree Once It Becomes Final

Because the due process clause does not invariably preclude nonparties from being bound by the results of prior litigation, the court must review the particular facts before it to determine whether the process afforded Respondents was constitutionally sufficient to preclude them from collaterally attacking the consent decree. The due process adequacy of a certain procedure is always tied to the particular situation facing the court: "[T]he interpretation and application of the Due Process Clause are intensely practical

matters . . . ." Goss v. Lopez, 419 U.S. 565, 578 (1975). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers, 367 U.S. at 895.

The Eleventh Circuit's analysis in the instant case failed to adopt this flexible, pragmatic approach. Instead it held flatly that due process requires that nonparties not be bound by the results of prior litigation. The court failed to examine the notice and prior opportunity to be heard afforded plaintiffs, or the countervailing interest of the government in finality to promote both the goals of Title VII and judicial efficiency. Thus, the Eleventh Circuit conducted no due process analysis as required by such cases as Mullane and Mathews v. Eldridge, 424 U.S. at 334:

> "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected."

There is no dispute in this case that Respondents here had adequate actual notice of the litigation years before entry of the consent decree. Indeed, Respondents' current counsel actively participated in the fairness hearing, raised at the time the same issues that are raised by Respondents here, and was given an opportunity to introduce evidence. When the governmental interests in finality and promoting the policies safeguarded by Title VII are measured against Respondents' interests, it is evident that Respondents have been afforded adequate due process and

should not, at this late date, be guaranteed a further right to challenge the lawfulness of the consent decree in an independent action.

As argued above, the government has a strong interest in according finality to a Title VII consent decree. Title VII reflects the strong federal policy against employment discrimination on the basis of race, sex, national origin or religion. Furthermore, the consent decree represents a peculiarly useful tool for the resolution of Title VII cases. It offers both the "preferred means for achieving" equal employment opportunity by voluntary compliance, Gardner-Denver Co., 415 U.S. at 44, and judicial supervision of the settlement, including a judicial determination, after a hearing, of the decree's fairness. The availability of this remedy for unlaw-

ful discrimination will be greatly reduced if it is not afforded finality as to all persons with notice and an opportunity to be heard in the original proceeding.

Strong arguments of judicial economy also support the governmental interest in finality. If the entry of a consent decree does not bar collateral attacks of the type presented here, then courts will be subject to ongoing litigation of the same issues, and face the specter of inconsistent results undermining principles of comity and potentially placing employers in the position of attempting to comply with conflicting judicial directives. Thus, not only does the position advocated by Respondents eviscerate an important Title VII remedy, but it renders the enforcement of a consent decree a morass for both the

federal courts and the parties to the decree.

If the process Respondents received here does not afford finality, parties wishing to protect their consent decree against collateral attack will feel compelled to join in a single lawsuit individuals and groups who are even potentially interested in the outcome. The costs of that approach are obvious. Mandatory joinder forces nonparties to become parties and to bear the expense of litigation (which in the Title VII context can include payment of the adversary's attorneys' fees). It also casts too broad a net, forcing all whom the parties think may come within the language of Rule 19 of the Federal Rules of Civil Procedure to become parties, thereby risking unmanageably large litigation. This danger is especially

acute in the context of Title VII class action litigation. On the other hand, where notice and an opportunity to be heard are afforded to all affected individuals, only those individuals who choose to bear the financial burdens and risks of litigation, and who actually wish to be heard, will become active participants.13/

The individual interest alleged by Respondents in this case must be measured against the strong governmental interest in finality and repose. Stripped to its essentials, what Respondents assert is the right to attack the lawfulness of the consent decree on their own timetable. The due process clause clearly does not guaran-

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13/ Correspondingly, both courts and parties will have an incentive to give adequate notice and an appropriate hearing to those whose collateral attacks they wish to preclude.

tee that right.14/ "What the Constitution does require," as this Court has repeatedly stressed, "is 'an opportunity [to be heard] . . . granted at a meaningful time and in a meaningful manner.'" Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (emphasis added in Boddie), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Respondents in the instant case had the meaningful opportunity to be heard that due process requires. Specifically, Respondents had an opportunity to submit objections at the time the court was considering the fairness of the decree to all interested and affected parties. It was at that point, not later -- and not in some

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14/ If it did, statutes of limitation would be unconstitutional; plainly, they are not. See Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945); Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944); Wheeler v. Jackson, 137 U.S. 245, 255 (1890).

collateral lawsuit -- that the court could best balance the rights and needs of all interested and affected parties, once and for all. Furthermore, individual disputes about the specific operation of the decree can always be presented to the original court through its continuing jurisdiction.[15/] Thus, Respondents had a meaningful opportunity to challenge the general lawfulness of the consent decree under Title VII in the original litigation. They also have the opportunity to challenge its particular application to themselves (although not its underlying lawfulness) by presenting a future application to intervene.[16/] As a result, "the risk of an

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15/ Indeed, the district court in this case has granted limited intervention for precisely those purposes on two occasions. J.A. 782-84.

16/ See n.15, supra.

erroneous deprivation of [Respondents'] interest through the procedures used [in this case]," Mathews v. Eldridge, 424 U.S. at 335, is relatively slight.

The Eleventh Circuit nevertheless reasoned that Respondents had no meaningful opportunity to be heard because "their Title VII claims did not accrue until after the decrees became effective and the challenged promotions were made; that is, their claims did not accrue until they were denied promotions." In re Birmingham Reverse Discrimination, 833 F.2d at 1498-99; Pet.App. 15a. This argument, although initially appealing, does not withstand analysis in the context of a Title VII consent decree.

In the usual case, a person could not, consistent with the due process clause, be said to have had an opportunity to be heard

on an unaccrued claim, because he or she would have had no notice of the claim and no standing to assert it. By contrast, Respondents here had notice that the race and sex-conscious relief of the proposed consent decree would affect their promotional opportunities as non-minority employees, and they were therefore afforded the opportunity to participate in the fairness hearing. Indeed, the objections to the remedies in the decree they now seek to relitigate were presented to and considered by the district court, and they would have been afforded party status had they sought to intervene in a timely fashion. Indeed, had Respondents timely intervened in the original action, they might have made the objections now presented as the basis for their collateral

suits the subject of an appeal from the judgment adopting the consent decree.17/

Thus, Respondents were like the competing railroad and other interests in Penn-Central Merger who were given an opportunity to assert their competing interest before the resolution of the

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17/ In the original action, the BFA and two of its members sought to intervene subsequent to the fairness hearing. No party filed a petition for certiorari to obtain this Court's review of the decision of the court of appeals affirming the denial of the petition to intervene as untimely. United States v. Jefferson County, 720 F.2d 1511, 1516-19 (11th Cir. 1983); J.A. 149. The propriety of that decision is, therefore, not before this Court. Nor is this Court presented with questions concerning the extent to which nonconsenting interveners may continue to pursue their objections to a consent decree in the original action. Cf. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S.Ct.at 3079-80. Rather, the Court is presented here only with the question whether a collateral suit attacking a consent decree may be maintained by persons making objections to the decree that are virtually indistinguishable from those actually heard and considered by the court prior to entry of the decree, and whose decision to seek intervenor status was unreasonably deferred to the point it was found untimely.

disputed action that would affect their rights was judicially approved. Therefore, notwithstanding the fact that individual employee claims may not have technically accrued prior to the entry of the consent decree, Respondents knew how their interests were implicated and had a meaningful opportunity to be heard. Further, Respondents can contest the actual implementation of the terms of the decree through the district court's ongoing jurisdiction.

Under these circumstances, and given the strong countervailing interest in affording Title VII consent decrees finality, due process does not require that Respondents now be given a second opportunity to attack the lawfulness of the consent decree.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In The

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October Term, 1988

JOHN W. MARTIN, et al.,

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ROBERT K. WILKS, et al.,

Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, et al.,

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation respecfully submits this brief amicus curiae in support of respondents. Consent to the filing of the brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

Pacific Legal Foundation has participated in other cases which involved employment discrimination issues and supports the rights of all employees to challenge race-conscious employment programs regardless of whether they were established by consent decree or were self-imposed. The Foundation's public policy perspective and litigation experience in support of individual liberties will help provide this Court with additional argument in which to view the holding of the Eleventh Circuit Court of Appeals in this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 833 F.2d 1492 (11th Cir. 1987).

STATEMENT OF THE CASE

This case presents the question whether nonminority employees who were neither parties to nor intervenors in an ongoing Title VII action are precluded from challenging race-conscious promotions instituted pursuant to a consent decree. Furthermore, this case raises an issue as to the validity of the impermissible collateral attack doctrine which bars independent third party claims under a theory of mandatory intervention.

This litigation originated in a Title VII employment discrimination action against the City of Birmingham (City) and Jefferson County Personnel Board (Personnel Board). The parties negotiated a settlement which resulted in two proposed consent decrees and thus the plaintiffs' claims against the City were never adjudicated. The consent decrees provided for race-conscious hiring and promotion plans as part of an extensive remedial scheme. Each decree specifically stated that it was not an adjudication or admission of liability by the defendants.

After the District Court entered a provisional order approving the decrees, a fairness hearing was held to consider the objections of interested parties. The fire fighters union filed objections as amicus curiae at that hearing. After the hearing, but prior to final entry of the

consent decree, the union and two individual members moved to intervene pursuant to Federal Rule of Civil Procedure 24(a), on the grounds that the proposed consent decrees would adversely affect their rights. The motion was denied as untimely and, subsequently, on August 18, 1981, the court entered an order approving the decrees.

In affirming the District Court's denial of the motion to intervene, the Eleventh Circuit concluded that the holding was not prejudicial to the white fire fighters because they still had the right to an independent action for unlawful discrimination on their own behalf.

Seven white fire fighters, who were existing employees, brought suit in District Court against the City and Personnel Board alleging that the race-conscious promotions made pursuant to a consent decree violated their Title VII and Fourteenth Amendment rights. Several other City employees who had been denied promotions subsequently brought similar suits against the City and Personnel Board, as did the United States, who was a signatory to the decrees.

Although the City and the Personnel Board admitted making race-conscious certifications pursuant to the terms of the decrees, they contended that the nonparty employees were bound by the consent decrees and that in any case, the challenged promotions were lawful because they had been made pursuant to the decrees.

After several black individuals who were signatories to the consent decree were allowed to intervene as party defendants, the District Court consolidated the several

suits under the caption *In re Birmingham Reverse Discrimination Employment Litigation.*

At the conclusion of plaintiffs' case during trial, the District Court granted the Personnel Board's motion to dismiss, holding that the individual plaintiffs were bound by the consent decrees.

On appeal, the Eleventh Circuit reversed and remanded with instructions that the District Court try the unlawful discrimination claims. The appeals court concluded that the nonparty fire fighters were neither parties nor privies to the consent decrees and that their claims did not accrue until after entry of the consent decree. In holding that the individual fire fighters were not bound by the decrees, the court rejected the impermissible collateral attack doctrine and found that the existing employees' individual claims of unlawful discrimination could not be precluded.

SUMMARY OF ARGUMENT

The question presented by this case is whether nonminority employees who were neither parties to nor intervenors in an ongoing Title VII action are precluded from challenging race-conscious promotions made pursuant to a consent decree in that action. Petitioners, the City of Birmingham, *et al.*, contend that the nonparty employees are barred from "collateral attacks" on the consent decree if they bypassed the opportunity to intervene in the original proceedings. This argument is unpersuasive for several reasons.

First, the impermissible collateral attack doctrine is an unwarranted exception to well-settled preclusion law. It violates due process when persons not party nor privy to an action are bound by the judgment. Second, the City's interpretation of the timeliness requirement of Rule 24 of Federal Rules of Civil Procedure does not provide nonparty employees with a constitutionally adequate opportunity to assert their interests. The mandatory intervention argument does not justify denying nonparties the right to assert claims that arose only *after* entry of the consent decree.

Finally, policies favoring voluntary settlement of discrimination claims do not give employers license to trammel the rights of existing employees. Title VII and the Equal Protection Clause protect *all* persons from unlawful discrimination by a public employer.

The nonminority fire fighters' claims did not even accrue until they were denied promotions pursuant to race-conscious plans established by the consent decree. Therefore, the Eleventh Circuit was correct in holding that the subsequent actions challenging unlawful discrimination were not impermissible collateral attacks.

ARGUMENT

I

THIS CASE IS NOT AN IMPERMISSIBLE COLLATERAL ATTACK ON THE CONSENT DECREE

Petitioners' impermissible collateral attack argument is not persuasive. They contend that the nonminority fire

fighters are barred from challenging the underlying consent decrees in a subsequent suit because they bypassed the opportunity to intervene in the original suit. *See* Brief of Petitioners Richard Arrington, Jr. and City of Birmingham at 20, *et seq.* However, this case can be best characterized, in the words of Justice Rehnquist, as presenting "the question whether a victim of alleged discrimination may have his right to sue totally extinguished by a prior suit to which he was not a party and in which a consent decree was entered before his cause of action even accrued." *Ashley v. City of Jackson*, 464 U.S. 900, 900 (1983) (Rehnquist, J., dissenting from denial of certiorari).

There is no justification, therefore, in well-settled preclusion law or policies favoring settlement of Title VII suits for barring a subsequent suit by a nonparty employee as an impermissible collateral attack. *Id.* at 903.

A. The Impermissible Collateral Attack Doctrine Is an Unwarranted Exception to Well-Settled Principles of Res Judicata and Collateral Estoppel

Several lower courts have developed a rule to preclude subsequent suits by nonminority employees who were neither party nor privy to the underlying Title VII litigation. These courts have held that nonparties to a consent decree are nonetheless bound by the decree and therefore any separate challenge must be dismissed as an impermissible collateral attack. The Eleventh Circuit, however, guided by decisions of this Court, expressly rejected the impermissible collateral attack doctrine as an unwarranted exception to well-settled principles of preclusion law. *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498 (11th Cir. 1987).

Several other circuits have also had second thoughts about the collateral attack doctrine. Both the Seventh and Ninth Circuits, for example, have suggested that they would reconsider their earlier position favoring the rule. *See Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986), and *County of Orange v. Air California*, 799 F.2d 535 (9th Cir. 1986). In addition, one panel of the Fifth Circuit has expressed doubt about the continued applicability of the doctrine. *Corley v. Jackson Police Department*, 755 F.2d 1207 (5th Cir. 1985).

Plaintiffs-respondents are existing employees who were neither parties in nor privy to the original action. *In re Birmingham*, 833 F.2d at 1498. It is a well-settled principle of preclusion law that nonparties to an action are not bound by the judgment. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 593 (1974). In his persuasive dissenting opinion in *Ashley* Justice Rehnquist notes that this rule can be traced to an 1816 opinion by Chief Justice Marshall. *Ashley v. City of Jackson*, 464 U.S. at 901 (Rehnquist, J., dissenting from denial of certiorari). Res judicata and collateral estoppel only prevent parties to a prior suit from attacking the judgment in a separate action. Restatement (Second) of Judgments § 28 (1980).

These same principles are all the more applicable to a consent decree. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (O'Connor, J., concurring). This Court recently emphasized that nonparties to a consent decree are not bound by it; a consent decree cannot impose duties or obligations on a third party without that person's consent. *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 92 L. Ed. 2d 405, 428 (1986). Moreover, even if a consent decree attempts to dispose of the claims of

third parties, those third parties will not be bound by the terms of the decree unless their interests have been adequately represented. *Id.*

Justice O'Connor noted in her separate concurring opinion in *Stotts*, that innocent third-party employees have the right to participate fully in the settlement process if they are to have any obligations or duties imposed upon them. If the plan affects the promotion opportunities of nonminority employees, those employees must be represented as parties to the decree or they will not be bound by it. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. at 573 n.3 (O'Connor, J., concurring).

The District Court below found that the individual fire fighters were neither parties nor privy to the consent decrees. *See* Appendix to Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (Petitioners' Appendix) at 105a. The Eleventh Circuit agreed, stating that their union's participation as an amicus at the fairness hearing was hardly enough to make the individual fire fighters parties to the decree. *In re Birmingham*, 833 F.2d at 1499.

In addition, the Eleventh Circuit determined, consistent with this Court's decision in *Cleveland*, that timely intervention by the white fire fighters still would not have precluded a subsequent suit. *Cleveland* also involved a public employer and a fire fighters' union. In *Cleveland*, however, the union actually intervened in the action. It presented evidence and had its objections heard at the fairness hearings, but the consent decree was, nonetheless, entered over the union's objections. The *Cleveland* Court found the union could not block the decree by

withholding its consent but the nonminority employees who did not consent to the decree were free to challenge the race-conscious measures established by the decree as violative of their Title VII (42 U.S.C. § 2000e-5) and Fourteenth Amendment rights. "A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of non-consenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." *Cleveland*, 92 L. Ed. 2d at 428.

This Court's decision in *Cleveland* that intervenors may challenge unlawful discrimination in a separate action should apply with all the more force to those who were neither parties nor privies to the action, such as the white fire fighters in the present case. The Eleventh Circuit was correct therefore in concluding that the nonminority employees had the right to challenge the promotions in a separate action. *In re Birmingham*, 833 F.2d at 1499 n.21.

The City has not identified the precise question presented here. Whether respondents had notice and opportunity to intervene in the action is *not* the issue. This definition of the issue presupposes that it is possible to resolve the claims of all persons who may be affected by the consent decree *prior* to entry of the decrees. However, this is simply not true; the nonparty employees' claims could not have been resolved prior to entry of the consent decree because those claims were based on actions taken pursuant to the terms of the decree.

The nonminority employees' cause of action for unlawful discrimination arose only after entry of the consent decrees. Their Title VII and constitutional claims

accrued only when they were denied promotions on the basis of race-conscious certifications made pursuant to the consent decrees. The nonminority fire fighters did not consent to the terms of the decrees and therefore are not precluded from challenging those decrees subsequently once they became victims of alleged unlawful discrimination.

Respondents' individual rights cannot be bargained away or sacrificed at the will of the employer. A race-conscious plan "cannot justify the discriminatory effect on some individuals because other individuals have approved the plan." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 281 n.8 (1986) (plurality opinion).

The appeals court therefore properly refused to bind the nonminority plaintiffs-respondents to the terms of the consent decree.

B. Due Process Limits the Preclusive Effect of Res Judicata in a Consent Decree Because It Is Not an Adjudication on the Merits

Due process is violated when judgments bind persons who were neither parties nor privies and therefore never had an opportunity to be heard. *Parklane Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979). Moreover, due process concerns are even greater in a consent decree which is not an adjudication on the merits. Because the merits are not fully litigated, nonparties have the right to subsequently challenge the unlawful conduct. *W. R. Grace and Co. v. Rubber Workers*, 461 U.S. 757 (1983).

This principle applies to consent decrees in other contexts as well. For example, as Justice Rehnquist noted in his dissenting opinion in *Ashley*, a consent decree

between the government and a private corporation based on alleged antitrust violations would not preclude a future suit by another corporation. Nonparties have an independent right to bring a private action against the defendant company for conduct that violates antitrust laws. 464 U.S. at 902.

Furthermore, this independent right is not lost just because the challenged conduct may be authorized by the consent decree. Compliance with the decree does not justify dismissal of any subsequent suit. For example, a prisoner subsequently harmed by prison conditions would not be precluded from bringing a suit, even if those conditions were in accord with a prior court decree. Such a decree could not bind a prisoner who did not consent to it. *Ashley*, 464 U.S. at 902 (Rehnquist, J., dissenting from denial of certiorari).

The same reasoning applies equally to a consent decree entered in an employment discrimination proceeding. Although such a decree binds those who consent to it, it "cannot be used as a shield against all future suits by nonparties seeking to challenge conduct that may or may not be governed by the decree." *Id.* at 902.

The distinction between a consent decree and a court order is important here. "The voluntary nature of a consent decree is its most fundamental characteristic." *Cleveland*, 92 L. Ed. 2d at 423. A consent decree by definition binds only those who consent to it. *Id.* at 524. A court who enters a consent decree does not resolve the underlying action on the merits, even though it must determine that the settlement is fair and reasonable. *Id.* at 423.

In determining that the white fire fighters were not adequately represented and therefore not bound, the court below emphasized several important factors. First, since the City did not defend the initial racial discrimination suit they hardly could have represented the nonminority plaintiffs' interests in the events which led to the entry of the decrees. In addition, the Eleventh Circuit characterized the City's interest as that of a "disinterested stakeholder with respect to the contested promotions."[1] *In re Birmingham*, 833 F.2d at 1499.

The court also noted that the original claim of employment discrimination was not adjudicated on its merits in the District Court prior to entry of the consent decree. Finally, the court noted that the City voluntarily entered into the consent decree. This voluntary settlement of the discrimination claim through the consent decree did not entitle it to bargain away the rights of its existing employees, however. In this respect a consent decree is given no greater weight than a voluntary affirmative action plan. *Cleveland*, 478 U.S. at 517.

Thus the appeals court in *Birmingham* correctly determined that the white fire fighters' subsequent suit was not an impermissible collateral attack on the consent decree.

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[1] This is an understatement. The Eleventh Circuit did not go far enough; the City of Birmingham was not just a disinterested stakeholder but, more accurately, the alleged wrongdoer in the employment discrimination case.

II

THE RULE OF MANDATORY INTERVENTION WHICH PETITIONERS ASK THE COURT TO ADOPT IS INVALID UNDER DUE PROCESS

Due process requires that the nonparty fire fighters be provided a constitutionally adequate opportunity to assert their interests. *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950). The City's interpretation of Federal Rules of Civil Procedure, Rule 24, however, would not provide the fire fighters with such an opportunity. In fact, the argument the City advances to support its "intervene or be precluded rule" ignores the precise issue presented by this case. It is not enough to ask whether notice and an opportunity to be heard in the original action preclude any subsequent action challenging the decrees. This determination alone does not conclude the analysis.

Notice and opportunity to be heard requirements were *not* satisfied here, but irrespective of whether these requirements were in fact met in this case, petitioners fail to address the particular facts which are highly relevant to resolution of this case. Namely, that the fire fighters simply were not required to intervene. Rule 24 of Federal Rules of Civil Procedure *allows* intervention; it does not compel it.

The City contends that the nonparty employees must intervene in the consent decree proceedings under Federal Rules of Civil Procedure, Rule 24(a), which provides:

> "Upon *timely* application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an *interest* relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter *impair* or impede the applicant's ability to protect that interest, unless the applicant's interest is *adequately represented* by existing parties." (Emphasis added.)

The nonparty fire fighters should have little difficulty in satisfying the *interest* and *impairment* requirements. Nonetheless, for purposes of the present argument, only the timeliness requirement is relevant here. (For an excellent analysis of the timeliness requirement of Rule 24, upon which this argument is based, *see* Kramer, L., *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. ___ (1988), to be published in November. A copy of the article has been lodged with the Court by the author.

The City concludes that intervention under Rule 24 provides the individual fire fighters with a constitutionally adequate opportunity to protect their interests. This conclusion, however, is incorrect. Rule 24 does not require the parties to notify the would be intervenors but instead puts the burden on nonparties to intervene and in addition provides that nonparties' motions to intervene can be denied if "untimely." However, the City's interpretation of the rule means that the nonparty employees can be precluded from a subsequent suit even if the only notice they had of the prior proceeding was published in a newspaper, which was the case here. This is not consistent with due process.

If nonparties are to have some due process protections, Rule 24's timeliness requirement should be applied

as follows: the first step under Rule 24's timeliness requirement is to determine when the nonparty fire fighters knew or should have known their interests were threatened. *See* Kramer, *supra*. The most obvious answer, is that they knew at the time they were actually injured by petitioners, *i.e.*, when they were denied promotions because of race-conscious practices made pursuant to the terms of the decree. They did not acquire an interest until after the entry of the decree, since they could not know ahead of time which employees would actually be affected by the race-conscious hiring and promotions practice. Thus, before the challenged promotions were made, the nonparty fire fighters could not have alleged any injury.

Due process is violated therefore when timeliness is measured before a consent decree is entered. The threat to nonminority employees' interests is too uncertain at that time to impose a "duty" to intervene. The City's argument that the nonparty fire fighters were required to intervene prior to entry of decree cannot withstand scrutiny under this due process analysis.

The next step of Rule 24's timeliness requirement, to be applied consistent with due process, is to determine how much time is reasonable after the nonparty knew or should have known intervention was necessary. To the extent the City's interpretation preempts the applicable statute of limitations, it modifies the substantive rights of the nonparty employees. *See* Kramer, *supra*. Courts are not authorized to modify these rights. *See* 28 U.S.C. § 2072. For example, Rule 24's timeliness requirements cannot shorten the statutorily prescribed limitations period in Title VII (42 U.S.C. § 2000e-5(f)(1)).

The purpose of litigation is to settle the claims of parties only. If the parties prefer to negotiate a settlement rather than fully litigate the case, then such a disposition would reach the desired result also, *i.e.*, to settle the claims. However, it would be a distortion of the legal process for courts or parties to proceed on the basis that other persons' rights should be sacrificed in order to facilitate settlement in the present action.

Moreover, whether the white fire fighters, who are the plaintiffs-respondents in this case, could have intervened is irrelevant under this analysis. After the fire fighters union's motion to intervene was denied as untimely, the individual fire fighters had no reason to believe that they had to intervene or that they would even be allowed to. Furthermore, once the order denying intervention to the union was affirmed by the appeals court the individual fire fighters instituted a separate action pursuant to the appeals court decision which stated that they had an independent right to challenge the illegal conduct after the decrees had been approved. *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983).

In a motion to intervene, prior to entry of the decrees, the nonparty employees could not have alleged any actual injury since the court had not yet approved the decrees. *Id.* at 1518. Because their interests had not yet been adversely affected, their right to assert their claims was not impaired as long as they could bring a subsequent suit. *Id.* at 1518. Thus, the appeals court properly rejected the impermissible collateral attack argument as unjustified to dismiss the subsequent suit by the nonparty employees.

In addition to an adequate opportunity to be heard, notice must also comply with due process requirements. If a consent decree is to bind interested third parties, formal notice is required even if the party knows the proceedings are pending. *See Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. at 314.

The nonparty employees did not receive formal or informative notice; notice was by publication in two newspapers. Petitioners' Appendix 146a. Although the appeals court noted that the union members knew at an early stage that their rights might be adversely affected, they were never formally notified that they must choose between intervening or being bound by the result. *Mullane*, 393 U.S. at 314. Since the individual nonminority employees could not have known with any certainty whether their own interests were adversely affected, it would be foreign to our concept of justice to bind them on a theory of mandatory intervention.

Thus, the collateral attack doctrine must be rejected; it cannot bar subsequent suits on a mandatory intervention theory. In addition, the right to bring a cause of action under Title VII is a property right that cannot be extinguished. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

Intervention under Rule 24 is allowed; it is not mandatory. If the City wanted to be sure that all interested persons are adequately represented in the proceedings it would have had to join them as "indispensable parties" under Rule 19 governing joinder.

Joinder under Federal Rules of Civil Procedure, Rule 19, would make the duty to join interested third persons

mandatory and thus eliminate the need to bar subsequent claims. Joinder would make it the parties' responsibility to see that all interested persons are before the court; it would not shift the responsibility to nonparties, as the City attempts to do. Despite the City's objection to joinder, it nonetheless is a far better alternative than mandatory intervention which places an excessive burden on nonparties.

III

TITLE VII'S POLICY FAVORING VOLUNTARY SETTLEMENT OF EMPLOYMENT DISCRIMINATION DISPUTES DOES NOT JUSTIFY UNLAWFUL DISCRIMINATION AGAINST EXISTING EMPLOYEES

The City contends that voluntary resolution of employment discrimination claims far outweighs any reason for allowing subsequent suits. This conclusion, however, is simply unjustified. Policy favoring settlement is not license for trammeling the rights of nonminority employees.

Moreover, the policy favoring settlement is *not* the only policy in Title VII. Congress has expressed a competing policy. By giving nonminority employees the same right to bring Title VII suits as minorities, Congress intended that the interests of all employees, regardless of race, be protected. *McDonald v. Santa Fe Trail*, 427 U.S. 273, 280 (1976).

The policies favoring settlement are reflected in the procedural requirements of Title VII and the role it creates for the Equal Employment Opportunity Commission (EEOC). *Alexander v. Gardner-Denver Co.*, 415 U.S. 36

(1974). The procedural requirements of Title VII provide the opportunity to settle disputes by "informal methods of conference, conciliation and persuasion" before a plaintiff may file a lawsuit. Title VII § 706(b), 42 U.S.C. § 2000e-5(b).

These requirements, however, pertain only to the period prior to filing of a suit. In the provisions governing the conduct of Title VII suits *after* the action is commenced, only one provision clearly promotes settlement; this provision provides for stays of Title VII suits – or of additional efforts to conciliate. Title VII § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

Congress, however, could have easily adopted certain measures to further the settlement policy after filing of the suit. They did not adopt such postfiling measures, however, and therefore this policy primarily applies to the period before a suit is filed. Consequently, the courts are not authorized to dismiss reverse discrimination suits in order to promote voluntary settlement of employment discrimination claims.

Moreover, the substantive rights of nonminority employees are meaningless if they are denied the opportunity to assert them. "The policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees . . . ." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. at 589 n.4 (O'Connor, J., concurring).

The Eleventh Circuit properly considered all of the above concerns in its determination. The Eleventh Circuit's decision successfully attempts to balance carefully

all the competing interests. This Court should acknowledge the need to be more sensitive to nonminority employees who have carried most of the burden of remedying the effects of past discrimination.

If make whole relief were provided only to those who have been victims of actual discrimination, much of the current confusion and conflict in the consent decree context would no longer exist. A decision by this Court to uphold the Eleventh Circuit's opinion would resolve much of the uncertainty that surrounds consent decree proceedings. In addition, steps can be taken to help eliminate many of the concerns expressed by the petitioners.

For example, finality of judgments will not be seriously undermined if this Court upholds the decision below. There are several possible alternatives for courts to explore. The timeliness requirement of Rule 24 could be relaxed to allow intervention at any stage. Another alternative would be to require the parties to join interested third parties under Rule 19.

Employers cannot use consent decrees as a shield against future challenges to illegal unconstitutional hiring and promotion quotas. If parties to consent decrees are immunized from charges of discrimination by nonparties, there is no reason to expect that these employers will impose upon themselves a duty to protect the interests of existing employees.

If parties are reluctant to settle their Title VII claims by consent decree if those actions will be subject to attack, then they are free to litigate the action instead, just as they would have done had a consent decree not been

an acceptable settlement device. The rights of non-minority employees under the Constitution and Title VII cannot be surrendered at the will of their employers.

CONCLUSION

The City's argument must ultimately be rejected. The nonparty fire fighters' suit challenging the race-conscious promotions made after entry of the consent decrees is *not* an impermissible collateral attack. Dismissing the subsequent suits on a theory of mandatory intervention has the unjust consequence of precluding the white employees, who themselves were denied promotions based on race, from ever having their claims heard on the merits. Consent decrees cannot be used as a shield against challenges to illegal and unconstitutional hiring and promotion practices.

The rule that nonparties to a prior proceeding are not bound by the judgment is nearly 200 years old. As Justice Rehnquist noted in his dissenting opinion in *Ashley v. City of Jackson*, 464 U.S. at 901, this principle is part of the "deep-rooted historic tradition" that everyone is entitled to his or her own day in court. *Id.*

The nonparty employees were not required to intervene because their claims did not even accrue until their interests were adversely affected by the challenged promotions made after entry of the consent decrees. Moreover, had they tried to intervene, their attempt would have fared no better than their union's attempted intervention, which was denied as untimely. The Eleventh Circuit noted in affirming the District Court's denial of

intervention that the union members could not have alleged any unlawful discrimination in their motion to intervene because the court had not yet given final approval to the consent decrees. *United States v. Jefferson*, 720 F.2d at 1518. Moreover, the appeals court said that the members could present such a claim after the decrees had been entered by "instituting an independent Title VII suit, asserting the specific violations of their rights." *Id.*

That is exactly what the nonparty employees did; they filed a subsequent suit after they were denied promotions pursuant to race-conscious certifications established by the consent decree. The timeliness requirement of Rule 24 of Federal Rules of Civil Procedure allows intervention, but does *not* compel it. Since the nonparty employees were unable to intervene, their only alternative was to challenge in a separate action the unlawful remedies contained in the consent decree. Pacific Legal Foundation urges that the decision of the Eleventh Circuit be upheld; it is in the public interest that nonparty employees, themselves victims of unlawful discrimination, have the opportunity to prove that their equal protection and Title VII rights have been violated.

DATED: September, 1988.

Respecfully submitted,

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IN THE

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OCTOBER TERM, 1988

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, IN SUPPORT OF RESPONDENTS

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v.
ROBERT K. WILKS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, IN SUPPORT OF RESPONDENTS

The International Association of Fire Fighters, AFL-CIO ("IAFF"), with the written consents of the parties,[1] respectfully submits this brief amicus curiae in support of the respondents, urging affirmance of the decision of the court of appeals below.

INTEREST OF THE AMICUS CURIAE

The IAFF is an unincorporated association comprised of municipal, state, and federal fire fighters throughout the United States and Canada. The current membership includes approximately 153,000 state and municipal fire fighters employed by states, cities, and towns across the United States.

The IAFF's objectives include promoting and securing improved wages, hours, and working conditions of fire fighters through collective bargaining, legislation, legal action, and other appropriate means.

The IAFF here represents the interests of its many members across the country who are employed in cities and towns whose employment rights are now, or may be, affected by the terms of consent decrees entered in settlement of employment discrimination lawsuits to which they are not parties. Most of the jurisdictions employing IAFF members operate pursuant to civil service laws which prescribe procedures for promotions. The legal principles espoused by the Court of Appeals below are perfectly consistent with the precedent of this Court. Those principles protect the rights of public employees to challenge decisions of their employers, taken pursuant to settlements of employment discrimination lawsuits brought by others, which constitute unlawful discrimination under Title VII of the Civil Rights Act of 1964, 42

[1] Letters of consent have been filed with the Clerk of the Court.

U.S.C. § 2000e, and the Fourteenth Amendment to the U.S. Constitution.

This brief is filed because of the IAFF's interest in ensuring the continued protection of its members' procedural due process rights.

STATEMENT OF THE CASE

The IAFF adopts the Statement of the Case found in the brief of respondents.

SUMMARY OF ARGUMENT

There is no general obligation for a nonparty to litigation to intervene in order to ensure that a judgment rendered in such litigation will not affect his legal rights. This Court's decisions confirm the application of this rule to employment discrimination actions.

When the due process rights of a public employee clash with the general public policy favoring settlement of employment discrimination actions, the Court of Appeals was correct in its holding that the latter must yield. The fact that an employee *may* intervene in a proceeding does not mean that he *must* intervene; his failure to do so will not prejudice his ability to challenge an action of his employer which he claims to be unlawful when that action occurs. Adoption of a contrary rule is wholly inconsistent with the statutory scheme.

ARGUMENT

AN EMPLOYEE'S RIGHT TO PURSUE A LAWSUIT CHALLENGING HIS EMPLOYER'S ACTIONS TAKEN PURSUANT TO A CONSENT DECREE IN A SUIT TO WHICH THE EMPLOYEE WAS NOT A PARTY IS NOT AFFECTED BY THE EMPLOYEE'S FAILURE TO INTERVENE IN THAT SUIT.

In 1934, Justice Brandeis wrote for a unanimous Court that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Chase National Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 441 (1934). "Unless duly summoned to appear in a legal proceeding," he went on, "a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.* See also, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."); *Ashley v. City of Jackson*, 464 U.S. 900, 902 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of certiorari).

Consistent with this principle, the Court below twice held that an employee need not intervene in pending employment discrimination litigation in order to preserve his right to challenge actions, taken pursuant to a settlement of such litigation, which adversely affect him and which he believes are the product of unlawful discrimination. In the first instance, *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983), the Eleventh Circuit dismissed an appeal from a denial of a motion to intervene, holding that the nonminority employees who sought intervention

> could not have alleged that they had suffered any reverse discrimination as a result of the Board's or the City's implementation of the affirmative action plan prescribed by the consent decrees, because the court had not yet approved those decrees. BFA members could present such a claim now, however, since the decrees have been approved and entered. *For example, they could do so by instituting an independent Title VII suit, asserting the specific violations of their rights.* The consent decrees would only become an issue if the defendant attempted to justify its conduct by saying that it was mandated by consent decree. [Fn. omitted]. If this were the defense, the trial judge would have to determine whether the defendant's action was mandated by the decree and, if so, whether that fact alone would relieve the defendant of liability that would otherwise attach. . . . Since we assume that the forum hearing any future suit by the would-be intervenors alleging discrimination would consider their claims carefully, we hold that the district court was justified in finding no prejudice to the BFA members' rights in denying intervention. [Fn. omitted].

720 F.2d at 1518-1519. (Emphasis added). Joint App. 158-159.

In the second instance, the Eleventh Circuit confirmed the propriety of respondents' reliance upon the earlier ruling and held that their independent challenge to City action denying them promotions based on the consent decree could proceed in federal court. *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987). Concluding "that these plaintiffs were neither parties nor privies to the consent decrees," the Court held "that their independent claims of unlawful discrimination are not precluded." 833 F.2d at 1498. Pet. App. 12a.

The Eleventh Circuit recognized that it was presented with a clash between two strong doctrines: on the one hand, that voluntary affirmative action plans are favored solutions for employment discrimination and on the other that no person should be denied a judicial opportunity to

assert a violation of his civil rights. The Court correctly concluded that in such a conflict, the rights of the individual must prevail.

This opinion is wholly consistent with this Court's decision in *Local Number 93, Firefighters v. City of Cleveland*, 478 U.S. ——, 92 L.Ed.2d 405 (1986). There, a union which had intervened and presented objections to a proposed consent decree, attempted to block the settlement. This Court held that the union could not, simply by reasons of its intervention, "preclude other parties from settling their own disputes and thereby withdrawing from litigation." 92 L.Ed.2d at 427-428. However, the Court also held that "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement." 92 L.Ed.2d at 428. The gist of this holding is that a nonconsenting intervenor may continue to press claims that conduct covered by a consent decree is unlawful. "[A] court may not enter a consent decree that imposes obligations on a party that did not consent to the decree . . . [T]he consent decree does not purport to resolve any claims the [intervenor] might have under the Fourteenth Amendment, . . . Section 703 of Title VII, . . . or as a matter of contract. . . ." *Id.*

Justice O'Connor specifically so noted in her concurring opinion—"As the Court explains, nonminority [public] employees therefore remain free to challenge the race-conscious measures contemplated by proposed consent decree as violative of their rights under § 703 [of Title VII of the Civil Rights Act of 1964] or the Fourteenth Amendment." 92 L.Ed.2d at 429. Surely if nonconsenting intervenors retain such rights, even where they have specifically intervened to object to entry of a consent decree, then nonconsenting persons who do not intervene should enjoy at least the same modicum of procedural protection.

The rights of nonminority nonparticipants in affirmative action settings were at the heart of *Wygant v. Jackson Board of Education*, 476 U.S. ——, 90 L.Ed.2d 260 (1986) as well. Treating the contention that the impact on non-minorities of the racial preference in layoffs was permissible under the Fourteenth Amendment because a majority of the affected non-minority employees did not object to it, Justice Powell explained:

> [W]hen a state implements a race-based plan that requires such a sharing of the burden, it cannot justify the discriminatory effect on some individuals because other individuals had approved the plan. Any "waiver" of the right not to be dealt with by the government on the basis of one's race must be made by those affected. . . . [T]he petitioners before us today are not "the white teachers as a group." They are Wendy Wygant and other individuals who claim that they were fired from their jobs because of their race. That claim cannot be waived by petitioners' more senior colleagues.

90 L.Ed.2d at 273, n.8.

Petitioners assert that unless nonparty employees intervene in class action employment discrimination suits to challenge the potential effects of proposed settlements, such nonparties should be precluded from complaining if and when the potentiality becomes the actuality. They would have this Court saddle the innocent nonparty, in advance of any specific impact on him, with the requirement that he discern what that impact someday may be and retain counsel to represent his interests, in a case in which he otherwise would have no role. They suggest that only by this method can the parties enjoy the benefits of finality in the settlement of their dispute.

All settlements embodying affirmative action contain some risk that the settlement may be challenged at some point in the future. While the parties may be deriving

significant benefits from resolving their differences, they may be doing so at the expense of non-parties. What petitioners ask this Court to do is to eliminate the risk that nonparties will come forward to complain when it comes time for them to shoulder the burdens of the decree, for which only the parties have received a benefit. They ask this Court to declare such post-decree complaints from nonparties to be impermissible *per se*. Such an insulation from suit simply cannot be accomplished by general notice to nonparties that litigation is being settled in a manner which may some day affect them.

This Court has held that a properly created affirmative action plan is a strong defense in subsequent actions by nonparties. See, *Johnson v. Transportation Agency, Santa Clara County*, 107 S.Ct. 1442 (1987). Petitioners take no solace in this holding. They simply want to be saved from ever having to raise the defense.

The dilemma which petitioners and their amici predict will result from an affirmance is that multitudes of challenges to decree-based actions will be mounted by affected nonparty employees. This dilemma is little different than that faced in *W.R. Grace Co. v. Local 759, Rubber Workers*, 461 U.S. 757 (1983). In *Grace*, this Court unanimously held that the settlement of employment discrimination charges, to which a union is not a party, which causes an employer to violate the provisions of a collective bargaining agreement, does not insulate the employer from any relief which the union may seek to remedy the contract violation. The facts were these: the Company settled sex discrimination charges by entering into a conciliation agreement with the EEOC which in part provided that in the event of layoffs, the Company would maintain the existing proportion of women in the bargaining unit. When a layoff occurred, the Company complied with the conciliation agreement, thereby causing the layoff of more senior men while junior female employees were retained in service. The union grieved for

the men and prevailed in arbitration. The Company filed suit in which it contended that public policy prevented enforcement of the contract in the circumstances.

Because this Court disagreed in such compelling language, we quote at some length:

> Given the Company's desire to reduce its work force, it is undeniable that the Company was faced with a dilemma: it could follow the conciliation agreement as mandated by the District Court and risk liability under the collective-bargaining agreement or it could follow the bargaining agreement and risk both a contempt citation and Title VII liability. The dilemma, however, was of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations. When the Union attempted to enforce its contractual rights, the Company sought a judicial declaration of its respective obligations under the contracts. During the course of this litigation, before the legal rights were finally determined, the Company again laid off employees and dishonored its contract with the Union. For these acts, the Company incurred liability for breach of contract.
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> The Company was cornered by its own actions, and it cannot argue now that liability under the collective-bargaining agreement violates public policy.
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> Nor is placing the Company in this position with respect to the court order so unfair as to violate public policy. Obeying injunctions often is a costly affair. Because of the Company's alleged prior discrimination against women, some readjustments and consequent losses were bound to occur. The issue is whether the Company or the Union members should bear the burden of those losses. As interpreted by [the arbitrator], the collective-bargaining agreement placed this unavoidable burden on the Company. By entering into the conflicting conciliation agreement, by seeking a court order to excuse it from perform-

ing the collective-bargaining agreement and subsequently acting on its mistaken interpretation of its contractual obligations, the Company attempted to shift the loss to its male employees, who shared no responsibility for the sex discrimination. The Company voluntarily assumed its obligations under the collective-bargaining agreement and the arbitrator's interpretations of it. No public policy is violated by holding the Company to those obligations, which bar the Company's attempted reallocations of the burden. [Footnote omitted].

* * * *

Enforcement of the [arbitral] award will not inappropriately affect this public policy [of voluntary compliance with Title VII]. In this case, although the Company and the Commission agreed to nullify the collective-bargaining agreement's seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective-bargaining agreement without the Union's consent . . . Permitting such a result would undermine the federal labor policy that parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored . . . Although the ability to abrogate unilaterally the provisions of a collective bargaining agreement might encourage an employer to conciliate with the Commission, the employer's added incentive to conciliate would be paid for with the union's contractual rights.

461 U.S. at 767-768, 770, 771. [Citations omitted].

Although the *Grace* case involved a settlement during the EEOC administrative process, the *Grace* principles are equally applicable here. An employer cannot alter the statutory or constitutional rights of its employees by court action unless the employees themselves agree, or are present or otherwise represented before the court. While the employees may voluntarily intervene, if they do not do so, it is incumbent on the employer to seek

their joinder if it wants to bind them to the result of the action. Otherwise, the employees properly remain free to challenge the employer whenever the court settlement invades their protected rights.

This Court has consistently rejected arguments that individual enforcement of rights against discriminatory conduct should be precluded. See *Ashley v. City of Jackson*, *supra*, and cases cited therein. The simple fact that such enforcement may implicate conduct purportedly immunized by a consent decree is not a basis to bar the door to the courthouse. Whether the individual ultimately prevails on his claim is not the issue; whether the law can deny him the right to try is.

Despite petitioners' protestations to the contrary, the right to object to the entry of a consent decree to which one is not a party is not an opportunity to try an individual employment discrimination case on the merits. A fairness hearing, after all, is designed to evaluate the fairness and adequacy of a proposed settlement for the absent class members. It is *their* claims that are going to be extinguished as a result, not those of absent nonparties. A fairness hearing is not intended to be the forum for intervenors individually to obtain judgments their own claims of discrimination which may result if the settlement is approved.

Even if this was the purpose of a fairness hearing, the respondents here cannot properly be criticized for not attempting intervention before the consent decree was entered. As shown earlier, other nonminority employees did attempt to intervene and were rebuffed in an order affirmed by the U.S. Court of Appeals for the Eleventh Circuit. Due to the earlier order, the Circuit Court reiterated in its opinion here under review, "we took pains to point out in Jefferson County that the denial of the motion to intervene was not prejudicial to the movants partly because they were not precluded from

instituting an independent Title VII suit." Pet. App. p. 15a, n.21.

Clearly, these respondents, unlike those non-minority employees in other cases relied on by petitioners, had a reasonable basis for not acting earlier. No party here took issue with the earlier order; no petition for a writ of certiorari was filed from the 1983 decision. Thus respondents here justifiably waited for their cause of action to accrue before seeking federal court relief.[2]

It is the rare public employee who can afford the expense of retaining an attorney to intervene in litigation to protect a right which may never be infringed upon. Yet if this Court accepts petitioners' arguments, that expensive burden will be the ultimate consequence of this Court's decision. This cannot be what Congress, the drafters of the Federal Rules of Civil Procedure, and the framers of the Fourteenth Amendment intended.

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[2] The petitioners would penalize respondents because they selected as their counsel the same attorney (Mr. Fitzpatrick) who represented the union and other individuals in the consent decree litigation. There is no precedent for the proposition that one who selects an attorney who appeared in a prior proceeding is therefore bound by the result of that earlier proceeding in the same manner as the party who retained the attorney in that proceeding. The petitioners' implication to the contrary is startling.

CONCLUSION

For the foregoing reasons, the Amicus IAFF submits that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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